92-420

No.

Supreme Court, U.S.
FILED
SEP 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RIVERBEND FARMS, INC., a California Corporation; SUNNY COVE CITRUS ASSOCIATION, a California Cooperative Corporation; BELRIDGE PACKING CO., a California Corporation; SEQUOIA ORANGE COMPANY, INC., a California Corporation; and EXETER ORANGE COMPANY, INC., a California Corporation,

Petitioner,

v.

EDWARD R. MADIGAN,
Secretary, Department of Agriculture,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MOODY
Suite 600
2300 N. Street, N.W.
Washington, D.C. 20037
(202) 663-9011

September 8, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

96

QUESTIONS PRESENTED

In response to alleged disorderly marketing conditions, USDA imposed discretionary quotas on the shipment of navel oranges grown in California and Arizona pursuant to marketing order 907 issued under the Agricultural Marketing Agreement of 1937. USDA claimed the "good cause" exception of informal notice-and-comment rulemaking under the APA. The Ninth Circuit agreed with the District Court that USDA's claimed "emergencies" were unjustified. But the Ninth Circuit invoked the "prejudicial error" doctrine to preserve the enforceability of the quotas, departing from decisions of every other appellate court and this Court holding that an agency's failure to abide by a required procedural safeguard rendered the resulting rule void and unenforceable. The questions presented are:

1. Whether regulations found by the Court to have been issued in violations of the APA's procedural safeguards can nevertheless have the "force of law" by virtue of the "prejudicial error" doctrine?

2. Assuming, *arguendo*, that the procedural error was harmless, did the reviewing courts abdicate their judicial function by failing to examine the substance of the quota rules to determine if they were arbitrary, capricious, or an abuse of discretion, thereby requiring remand for the lower courts to perform this essential task?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE	2
ARGUMENT	6
1. Review should be granted because the Ninth Circuit has decided an important question of federal law contrary to all prior decisions of this Court.	6
2. Review should be granted to prevent the "prejudicial error" doctrine from becoming the exception that swallows the "rule" of procedural safeguards.	9
a. The decision will encourage agencies to evade procedural safeguards and avoid judicial review.	10
b. By abandoning a bright line test, the decision will embroil the courts in ad hoc case-by-case review of agency procedures and challengers actions in order to determine if there is enough prejudice to warrant invalidation of agency action.	14
3. The decision ignores Congressional intent that procedural safeguards be strictly enforced by courts and the original narrow construction given to the "prejudicial error" rule.	20

TABLE OF CONTENTS—Continued

Page

4. Review should be granted to resolve the split in the circuits created by this decision. 21

5. The decision should be summarily reversed in order to permit the lower courts to perform the required task upon judicial review of agency action to determine substantively whether it was arbitrary, capricious, or an abuse of discretion... 24

6. Review should be granted because the decision will impact dozens of other cases. 28

APPENDIX:

Ninth Circuit Opinion Affirming in Part, Reversing in Part, and Remanding, March 17, 1992 ..... 1a

Ninth Circuit Order Denying Rehearing, June 9, 1992 ..... 17a

District Court Opinion Denying USDA Motion for Reconsideration, March 22, 1990 ..... 19a

District Court Opinion Granting Plaintiffs' Motion for Summary Judgment, May 31, 1989 ..... 22a

Statutes 34a

Regulations 50a

USDA August 25, 1992 press release 53a

TABLE OF AUTHORITIES

Cases: Page

Action on Smoking and Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983), subsequent appeal, 724 F.2d 211 (D.C. Cir. 1984) 22
American Horse Protection Assn. v. Lyng, 812 F.2d 1 (D.C. Cir. 1987), review after remand, 681 F. Supp. 949 (D.D.C. 1988) 25
American Textile Mfgrs. Inst. v. Donovan, 452 U.S. 490 (1981) 18
Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) 22
Arlington Oil Mills v. Knebel, 543 F.2d 1092 (5th Cir. 1976) 22
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 8, 14
Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, 419 U.S. 281 (1974) 24
Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 24
Buschman v. Schweiker, 676 F.2d 352 (9th Cir. 1982) 14
Chocolate Mfgrs. Assn. of U.S. v. Block, 755 F.2d 1098 (D.C. Cir. 1985) 22
Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 6-8
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 15, 24
City of Brookings Mut. Tel. Co. v. FCC, 822 F.2d 1153 (D.C. Cir. 1987) 25
County of Del Norte v. U.S., 732 F.2d 1462 (9th Cir. 1984) 9
Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987), affirmed, 488 U.S. 204, 109 S. Ct. 468 (1988) 9, 22
Independent US Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir. 1987), cert. den., 108 S. Ct. 76 (1987) 15
Levesque v. Block, 723 F.2d 175 (1st Cir. 1983) 22
Lionz v. Heckler, 800 F.2d 871 (9th Cir. 1986) 22
Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987) 15

TABLE OF AUTHORITIES—Continued

	Page
Market Street Ry. v. Cal. Railroad Commission, 324 U.S. 548 (1945)	21
McKesson v. Div. of Alcoholic Beverages and Tobacco, Dept. of Bus. Regulation of Florida, 496 U.S. 18 (1990)	28
McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988)	15, 21
Morton v. Ruiz, 415 U.S. 199 (1974)	8
Motor Vehicle Mfgrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	15, 18, 24
National Farmers Org. v. Lyng, 695 F. Supp. 1207 (D.D.C. 1988)	25
NBC v. United States, 319 U.S. 190 (1943)	8
New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980)	22
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	7-8
P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971)	23
Pickus v. U.S. Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974)	15
Rivera v. Patino, 524 F. Supp. 136 (N.D. Cal. 1981)	23
Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975)	22
Riverbend Farms v. Madigan, 958 F.2d 1479 (9th Cir. 1992)	*passim*
Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760 (9th Cir. 1986)	9
San Diego Air Sports Center v. FAA, 887 F.2d 966 (9th Cir. 1990)	22
Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979)	21
Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991)	23
Shelton v. Marsh, 902 F.2d 1201 (6th Cir. 1990)	9
Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983)	21, 23
Southern California Aerial Advertisers' Association v. FAA, 881 F.2d 672 (9th Cir. 1989)	22
State of Alaska v. U.S. Dept. of Transportation, 868 F.2d 441 (D.C. Cir. 1989)	22

TABLE OF AUTHORITIES—Continued

	Page
State of South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004 (D.S.C. 1983), rev'd on other grounds, 717 F.2d 874 (4th Cir. 1983), cert. den., 465 U.S. 1080 (1984)	23
Texaco v. FPC, 412 F.2d 740 (3d Cir. 1969)	23
U.S. Steel Corp. v. EPA, 595 F.2d 207, rehearing and clarification denied, 598 F.2d 915 (5th Cir. 1979)	22
United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977)	18
United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989)	22
United States v. Reinis, 794 F.2d 506 (9th Cir. 1986)	22
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)	7, 15
W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987), rehearing denied and opinion amended, 819 F.2d 237 (1988)	22
Walter A. Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971)	10. 15, 22, 25
Weyerhauser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)	22
Statutes:	
5 U.S.C. § 553(b)	5
5 U.S.C. § 553(c)	5
5 U.S.C. §§ 553(b), (c)	2
5 U.S.C. § 553(b) (3) (A)	8
5 U.S.C. § 553(b) (3) (B)	4, 14
5 U.S.C. § 703	18
5 U.S.C. § 706(2) (A)	24
5 U.S.C. § 706(2) (A) and (D)	2
5 U.S.C. § 706(2) (D)	4
5 U.S.C. § 706(F)	2
7 U.S.C. § 601, et seq.	1
7 U.S.C. § 602(1)	2
7 U.S.C. § 602(2)	2
7 U.S.C. § 602(4)	2
7 U.S.C. § 602(5)	2

TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. § 608a(5)	28
7 U.S.C. § 608c(6)(C)	2, 4
7 U.S.C. § 608c(11)(C)	2
7 U.S.C. § 608c(15)(A)	17
7 U.S.C. § 608c(16)	2
7 U.S.C. § 608c(16)(A)	2
28 U.S.C. § 1254(1)	1
31 U.S.C. § 3729, et seq. (False Claims Act)	29
Regulations:	
7 C.F.R. § 907	2
7 C.F.R. § 907.110	3
7 C.F.R. § 907.50	3, 27
7 C.F.R. § 907.51(a)	27
7 C.F.R. § 907.52	2
7 C.F.R. § 907.83(b)	2
7 C.F.R. § 907.50(a)	3
44 Fed. Reg. 28474, 28479 (May 15, 1979)	11
45 Fed. Reg. 31953 (May 15, 1980)	11
45 Fed. Reg. 75454, 75455, 75457 (Nov. 14, 1980)	11
46 Fed. Reg. 23872, 23873 (Apr. 28, 1981)	11
49 Fed. Reg. 29071, 19076 (July 18, 1984)	11
49 Fed. Reg. 48265 (Dec. 12, 1984)	26
50 Fed. Reg. 5 (Jan. 2, 1985)	26
50 Fed. Reg. 39132 (Sept. 27, 1985)	5
51 Fed. Reg. 35517 (Oct. 6, 1986)	5
52 Fed. Reg. 38431 (Oct. 16, 1987)	5
52 Fed. Reg. 41602 (Oct. 30, 1987)	5
53 Fed. Reg. 45309 (Nov. 9, 1988)	5
53 Fed. Reg. 49649 (Dec. 9, 1988)	5
54 Fed. Reg. 42966 (Oct. 19, 1989)	5
54 Fed. Reg. 46359 (Nov. 3, 1989)	5
55 Fed. Reg. 36653 (Sept. 6, 1990)	5
55 Fed. Reg. 50157 (Dec. 5, 1990)	5
56 Fed. Reg. 49432 (Sept. 30, 1991)	5, 13
56 Fed. Reg. 61109 (Dec. 2, 1991)	14
56 Fed. Reg. 64188 (Dec. 9, 1991)	14
56 Fed. Reg. 66341 (Dec. 23, 1991)	14
57 Fed. Reg. 1215 (Jan. 13, 1992)	14
57 Fed. Reg. 4691 (Feb. 7, 1992)	5, 13

TABLE OF AUTHORITIES—Continued

	Page
57 Fed. Reg. 5975 (Feb. 19, 1992)	14
Executive Orders 12044, 12291, and 12498	11
Secretary's Memorandum 1512-1 25	11
Legislative:	
Administrative Procedure, Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess. at 1506-07, 1514-15 (1941) (statement of Ashley Sellers, USDA, Office of the Solicitor)	11
Attorney General's Manual on the Administrative Procedure Act 110 (1947), reprinted in, Administrative Conference of the United States, Federal Administrative Procedure Sourcebook 51, 159 (1985)	21
H.R. Rep. No. 1080, 79th Cong., 2d Sess. 46 (1946) ("House Report"), reprinted in, Administrative Law (Pike & Fisher) 3d, Desk Book at 3-104 ("Desk Book")	20
S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945) ("Senate Report"), reprinted in, Desk Book at 3-36	20
Other:	
Agribusiness Associates, Economic Analysis of Volume Controls, California-Arizona Navel Orange Marketing Order (1985)	27
General Accounting Office, The Role of Federal Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions. [RCED 85-57] (July 31, 1985)	27
Jesse & Johnson [Agric. Econ. Rpt. No. 471, Tr. Ex. 41], Effectiveness of Federal Marketing Orders for Fruits and Vegetables (1981)	27
Kozinski, "The Dark Lessons of Utopia," 58 U. Chi. L. Rev. 575, 585 (1991)	19
Nelson & Robinson, "Retail and Wholesale Demand and Marketing Order Policy for Fresh Navel Oranges," 60 American Journal of Agricultural Economics 502-09 (August, 1978)	27

TABLE OF AUTHORITIES—Continued

Page

Office of Management and Budget. "Agricultural Marketing Orders" (2/18/82) 27

Powers, "Prices and Shipments During Prorate and Prorate Suspension for the California-Arizona Navel Orange Federal Marketing Order," Citrus Fruits Situation and Outlook (Feb. 1986) 27

Shepard, "Cartelization of the California-Arizona Orange Industry 1934-81," 29 Journal of Law and Economics 83-123 (1986) 27

Thor & Jesse [Tech. Bull. 1664, Tr. Exs. 39 & 40], Economic Effects of Terminating Federal Marketing Orders for California-Arizona Oranges (1981) 27

USDA, Agricultural Marketing Service, ("Study Team Report") [Agric. Econ. Rpt. No. 477], A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops—Economic Efficiency and Welfare Implications (1981) 27

USDA, Guidelines for Fruit, Vegetable and Specialty Crop Marketing Orders (Jan. 25, 1982 May 8, 1983), reprinted in, General Accounting Office, The Role of Federal Marketing Orders in Establishing and Mantaining Orderly Marketing Conditions. [RCED 85-57] (July 31, 1985) 12, 27

USDA August 25, 1989 press release 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners Riverbend, Belridge, Sunny Cove, Sequoia and Exeter, all shippers of navel oranges grown in California, pray that a writ of certiorari issue to review the decision and judgment of the U.S. Court of Appeals for the Ninth Circuit issued in this case on March 17, 1992.

OPINIONS BELOW

The unpublished May 31, 1989 opinion granting Petitioners' motions for summary judgment of Judge Price, Eastern District of California, may be found at App. 22a-33a. Judge Price's unpublished March 22, 1990 opinion denying USDA's motion for reconsideration may be found at App. 19a-21a. The Ninth Circuit's March 17, 1992 opinion affirming in part, reversing in part, and remanding the case to Judge Price is reported at 958 F.2d at 1479, and may be found at App. 1a-18a.

JURISDICTIONAL STATEMENT

The Ninth Circuit's judgment was entered on March 17, 1992. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 9, 1992. This Court has jurisdiction to hear this petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).[1]

STATUTES AND REGULATIONS

The regulations challenged by Petitioners are navel orange shipment quotas imposed during the 1975-85 seasons. These quotas, a typical example being 50 Fed. Reg. 5 (Jan. 2, 1985), App. 50a-52a, were imposed by the Secretary of Agriculture under Marketing Order 907, 7 C.F.R. § 907 ("Order"), App. 40a-49a, which was issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* ("AMAA"), App. 36a-40a. The Ninth Circuit found that the Secretary violated the

[1] Pursuant to Rule 14.1(b), all parties in the court below are listed in the caption. Pursuant to Rule 29.1, none of the corporations listed in the caption has a parent and none has any subsidiaries that are not wholly-owned.

procedural safeguards in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(b), (c), App. 34a-35a. The judicial review authority is found in §§ 706(2)(A) and (D) of the APA, App. 35a-36a. The "prejudicial error" rule is found at § 706(F), App. 36a. Limitations on the Secretary's exercise of discretion to impose quotas are found at 7 U.S.C. § 608c(16) (required termination of ineffective or obstructionist regulations), § 608c(6)(C) (quotas must be equitable and imposed under a uniform rule); and § 608c(11)(C) (quotas must account for regional differences in production and marketing conditions), App. 38a-40a.

STATEMENT OF THE CASE

Congress authorized the Secretary to issue regulations called marketing orders containing a variety of regulatory tools designed to deal with various forms of market failure. The navel Order authorizes seasonal and weekly quotas on the quantity of oranges each handler may ship to the domestic market, including Canada. Both the quotas and the Order itself are discretionary. The Secretary may only impose quotas if he finds they are necessary to restore order to a disrupted market, i.e., a market characterized by "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4), 7 C.F.R. § 907.52. If used, quotas must also improve growers' economic well-being, i.e. restore them to "parity" with other sectors in the economy, 7 U.S.C. § 602(1), at a rate that "protect[s] the interest of consumer[s]" by "gradual correction" of prices, 7 U.S.C. § 602(2). In evaluating the potential for "unreasonable fluctuations in supplies and prices," 7 U.S.C. § 602(4), the Secretary must consider "the interests of producers and consumers." And in assessing the potential for the "disruption of the orderly marketing," 7 U.S.C. § 602(5), of navel oranges, his decision to regulate or not must be measured against a "public interest" standard. Quotas must not be imposed if not needed to restore orderly marketing, or if their use would actually impair the orderly functioning of an unregulated market. 7 U.S.C. § 608c(16)(A); 7 C.F.R. § 907.83(b).

The Order establishes a private-sector Navel Orange Administrative Committee to assist the Secretary which is controlled by Sunkist Growers, Inc., Petitioners' largest competitor. NOAC filed its annual recommendation for quotas, called a marketing policy, 7 C.F.R. § 907.50, prior to the beginning of each season. These contained a seasonal quota, § 907.50(a)(2), a shipping schedule that apportioned the quota on a weekly basis, § 907.50(a)(3), and a formula that allocated the weekly quota among regions in California and Arizona, called districts under the Order, 7 C.F.R. § 907.110. During the seasons at issue in this case, the Secretary approved these recommendations prior to the beginning of each season. Modifications to the weekly quotas set forth in NOAC's marketing policy and approved in USDA's position paper were sometimes proposed by NOAC at its Tuesday meetings (in the range of 1-5%) and always approved the next day by USDA.

Season-long quotas have been used continuously since the 1936-37 season. There were no quotas during the 1952-53 season because the industry was in the process of separating the quota program for oranges into separate programs for navel (winter) oranges (Order 907) and Valencia (summer) oranges (Order 908). Starting in 1975 the Secretary began phasing out quotas in Southern and Northern California and in Arizona. By the 1982-83 season, there were no quotas in these areas. The only remaining regulated area was the San Joaquin Valley. Oranges produced elsewhere in the country (Texas and Florida) and imported from abroad have never been subject to shipment quotas.

Starting in the late 1970's, an increasing number of independent shippers began to doubt the continued efficacy of shipment quotas, believing they simultaneously caused over-production and under-marketing, that they reduced rather than increased growers' revenue and stimulated competition from areas outside the Order, that they discriminated against independents in the San Joaquin Valley, and they were no longer needed to maintain "order"

in the market because of significant changes in production and marketing conditions since the Depression.

The first administrative petition was filed October 29, 1980. Following an administrative trial in October, 1985, the Chief ALJ issued his April 23, 1987 decision, Ninth Circuit Ex. Rec. Tab 1, finding that the Secretary violated the notice-and-comment provisions of the APA by improperly claiming the § 553(b)(3)(B) "good cause" exception in issuing quotas during the 1975-76 through 1984-85 seasons, and that the Secretary acted arbitrarily and capriciously by failing to explain his continued imposition of rigid quotas in the San Joaquin Valley while phasing them out elsewhere. Following the Secretary's January 29, 1988 reversal of this decision, Ninth Circuit Ex. Rec. Tab 2, Petitioners filed suit in district court. The District Court agreed with the ALJ that the Secretary had violated the procedural safeguards of the APA, but rejected Petitioners' statutory challenge that the quotas violated the "equity" and "uniform" rule requirements of 7 U.S.C. § 608c(6)(C).

Both Petitioners and USDA appealed. The Ninth Circuit affirmed the District Court:

> We thus conclude that the Secretary's rulemaking fails to satisfy the APA's requirements because he has not demonstrated good cause for failing to give sufficient notice in the *Federal Register* of the weekly NOAC meeting and failing to allow the public to comment by means other than personal participation at the NOAC meeting.

App. 11a.

The legal consequence of the Court's conclusion should have been to void the quotas pursuant to the Congressional imperative to judges in the APA that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedures required by law." 5 U.S.C. § 706(2)(D). Contrary to the teachings of this Court, Congressional intent, and decisions from other circuits, the Court held that the quotas remained enforceable. App. 11a-13a.

The Court mistakenly focussed on the conduct of *Petitioners* in excusing USDA noncompliance with the APA despite the fact that agency rules carry the "force of law" only if the *agency* has complied (which the Court correctly found it had not) with all the substantive and procedural requirements imposed by Congress. The Court relied on three considerations: (1) USDA's long-standing practice of imposing quotas without § 553 public participation; (2) invalidation of past quotas would permit Petitioners to succeed in forfeiture proceedings brought against them by the Secretary for allegedly exceeding the quotas; and (3) Petitioners had a chance to participate in weekly NOAC meetings.

The Secretary never followed the notice-and-comment provisions of § 553(b) until just prior to the administrative trial in this case.[2] These initial comment opportunities were illusory because USDA specifically disavowed[3] the APA-guaranteed right to "participation" in the rulemaking process, i.e. the rights to have comments considered by and responded to by the decisionmaker. It wasn't until after the March 22, 1990 District Court denial of USDA's motion for reconsideration that the Secretary finally began complying with the participation and reasoned decisonmaking requirements of § 553(c).[4]

---

[2] 50 Fed. Reg. 39132 (Sept. 27, 1985). Despite over 1200 weekly "emergencies" over the previous 40 seasons, USDA sought public comment for the first time. While the litigation was continuing, USDA continued to seek public comment for the next four seasons. 51 Fed. Reg. 35517 (Oct. 6, 1986); 52 Fed. Reg. 38431 (Oct. 16, 1987); 53 Fed. Reg. 45309 (Nov. 9, 1988); 54 Fed. Reg. 42966 (Oct. 19, 1989). In fact, for the 1987-88 through 1989-90 navel seasons, USDA even issued the first weekly quota regulation as an interim final rule with an additional request for comments. 52 Fed. Reg. 41602 (Oct. 30, 1987); 53 Fed. Reg. 49649 (Dec. 9, 1988); 54 Fed. Reg. 46359 (Nov. 3, 1989).

[3] "Publication of this summary of the marketing policy does not create any legal obligations, either substantive or procedural." *E.g.*, 50 Fed. Reg. 39132 (Sept. 27, 1985).

[4] 55 Fed. Reg. 36653 (Sept. 6, 1990) (proposed rule), 50157 (Dec. 5, 1990) (final rule); 56 Fed. Reg. 49432 (Sept. 30, 1991) (proposed rule), 57 Fed. Reg. 4691 (Feb. 7, 1992) (final rule).

ARGUMENT

1. Review should be granted because the Ninth Circuit has decided an important question of federal law contrary to all prior decisions of this Court that regulations carry the "force of law" only if promulgated according to procedures required by law. This Court has never ruled on the applicability of the "prejudicial error" escape clause to agency failures to comply with the procedural safeguards in § 553 of the APA. On numerous instances it has indicated that compliance with the minimum requirements of § 553 is a necessary condition precedent to agency regulations having the "force of law." This case presents the Court with the opportunity to draw a clear line distinguishing enforceable rules from those which are void *ab initio* and unenforceable in instances such as this case where the agency did not follow § 553 procedures. A clear statement from this Court will protect the efficacy of rules promulgated in compliance with § 553 and will also ensure that the procedural safeguards established by Congress are not unduly eroded by an exception swallowing the rule.

"It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). This Court held that a regulation authorizing the disclosure of records otherwise exempt under the Freedom of Information Act was invalid because it was not issued pursuant to authority delegated by Congress and because it was infected by a procedural defect, failure to publish the rule and provide for comment as required by § 553 of the APA:

> In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. . . . That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental de-

> partments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. . . . Likewise, the promulgation of these regulations must conform with any procedural requirements imposed by Congress. . . . For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Id. at 301-03.

Comparing the failure to publish the disclosure rule at issue with the court-imposed procedures found unlawful in *Vermont Yankee Power Corp. v. NRDC*, 435 U.S. 519 (1978), this Court observed:

> It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so. . . . Courts upset that balance [" 'between opposing social and political forces,' " *Vermont Yankee*, 435 U.S. at 547, quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)] when they override informed choice of procedures and impose obligations not required by the APA. By the same token, courts are charged with maintaining the balance: ensuring that agencies comply with the "outline of minimal essential rights and procedures" set out in the APA. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946). . . . Certainly regulations subject to the APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act

Id. at 313. Under *Vermont Yankee*, courts may not impose additional procedural requirements,[5] but under

---

[5] "[N]othing in the APA . . . entitled the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) . . . so long as the [agency] employed at least the statutory minima . . . ." 435 U.S. at 549. "Of course, the court must determine whether the agency complied with the procedures mandated by the relevant statute." *Id.* n.21.

Chrysler, courts must insist on agency adherence to the minimum requirements specified by Congress. Together, these cases teach that courts must insist on strict compliance with the APA procedural safeguards.

The agency had argued that the disclosure regulation was an interpretative rule and therefore exempt from public participation under § 553(b)(3)(A). This Court said it didn't matter whether the rule was interpretative or substantive because it could not have the "force of law" because it was not promulgated with public participation:

> It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. . . . With the [agency] consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate.

Id. at 315-16 (citations omitted). *Cf. Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (eligibility requirement published in staff manual cannot have the "force of law" because not published in accord with APA); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (agency cannot impose legislative rule through adjudication); *see also, e.g., NBC v. United States*, 319 U.S. 190, 224-25 (1943) (upholding "chain broadcasting" rules in part because "there [was] no basis for any claim that the Commission failed to observe procedural safeguards required by law.").

This Court implicitly rejected a "no prejudicial error" defense in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The agency, HHS, reissued in 1984 a rule concerning Medicare cost reimbursement methodology that had previously been invalidated for failure to comply with notice-and-comment procedures. This Court struck down HHS's attempt to make the new validly-promulgated rule retroactive to 1981 for lack of Congressional au-

thorization and because the APA normally limits rules to prospective application. HHS argued that it was not unfair to make the rule retroactive because it simply cured a procedural defect and the earlier invalidated rule provided "ample notice" to hospitals of the standard that would be applied. Correctly focussing on the agency's "mistake" rather than fairness to or knowledge of the parties (as did the Ninth Circuit in this case), Justice Scalia explained that judicial acceptance of HHS's "cure" would eviscerate the APA:

> I fully agree with District of Columbia that acceptance of the Secretary's position would "make a mockery . . . of the APA," since "agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis."

Id. at 225 (Scalia, J., concurring), quoting *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987).

This case provides the Court with the opportunity to explicitly state that agency compliance with Congressionally mandated procedural safeguards is a condition precedent to a rule having the "force of law," and that such compliance cannot be conditioned, undermined, or excused by a judicially-created requirement that challengers prove prejudice beyond denial of the statutory right.[6]

2. Failure to grant review would leave a clearly erroneous, indeed dangerous, decision in place. Such an escape

---

[6] An explicit holding requiring that rules issued without following the procedural safeguards of § 553, as in the present case, are invalid and do not have the "force of law" would not read the "prejudicial error" rule out of the APA, and would not threaten the holdings in cases upholding rules when there was a mere technical noncompliance, i.e. when the record demonstrates that the purposes of § 553 were met through other means. *See, e.g., Shelton v. Marsh*, 902 F.2d 1201 (6th Cir. 1990); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986); *County of Del Norte v. U.S.*, 732 F.2d 1462 (9th Cir. 1984). The purposes of advance notice were served in each of these cases because public participation was a reality, i.e. comments were received by and responded to the agency.

clause would encourage agencies to erode, if not ignore, procedural safeguards in the hope that their rules would be less subject to judicial scrutiny and reversal. The agency's obligation in the first instance is to justify the resulting rule by complying with the procedures and substance of reasoned decisionmaking. The Ninth Circuit's decision turns this obligation on its head. This decision places a burden on challengers to prove to a reviewing court that the result an agency reached would have been different. With the procedural safeguards effectively eviscerated by the Ninth Circuit, the balance struck in the APA is upset. Because courts are overworked, this decision will encourage agencies to be quite inventive in their descent to minimal compliance, or, as in this case, noncompliance with procedural safeguards. App. 11a. By blurring the bright line of which regulations have the "force of law," the decision will increase uncertainty and litigation, and will render compliance and enforcement more difficult. USDA's extreme bad faith in the present case illustrates the risks to the efficacy of the decisionmaking process if this erroneous decision is allowed to stand.

a. Congress intended agencies to strictly comply with procedural safeguards. This decision will further encourage agencies to engage in all manner and variety of "forms of indirection." Congress admonished the courts to prevent such actions which have a powerful tendency to avoid or diminish public participation and evade meaningful judicial review.

This case graphically demonstrates the extremes to which an agency will go to evade substantive scrutiny by avoiding procedural safeguards. The harm done by USDA may also be demonstrated by its flagrant and repeated disregard of procedures it *knew* were required by law. *See Walter A. Holm v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971). Like an ostrich, USDA struck its head in the sand and deliberately avoided creating a record for judicial review because it knew that quotas could no longer be justified in light of changed production, marketing and

competitive conditions since the quota program began in 1935. When Congress passed the APA, it refused USDA's request for a blanket exemption from the APA's notice requirements.[7] In its request, USDA even cited the orange quota program at issue here. USDA's annual pre-season approval of the quotas[8] was designated a "major ule" which, under USDA's internal regulation (Secretary's Memorandum 1512-1) and Executive Order 12044, 12291, and 12498, required heightened public participation and analytical requirements.[9] USDA did provide public participation for all volume control programs except for the three Western Citrus orders. The Secretary finally conceded[10] that public participation was required prior to approving each season's quota program, but, at least until

[7] Administrative Procedure, Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess. at 1506-07, 1514-15 (1941) (statement of Ashley Sellers, USDA, Office of the Solicitor, comments 4 and 11).

[8] App. 3a, 10a n.5, 13a, 25a. *See, e.g.*, November 18, 1981 letter from Secretary Block to NOAC Chairman Canham (Trial Ex. 379) ("I have approvad the marketing program for Order No. 907 for the 1981-82 season, including the prorate feature provided for in Order 907."); *see also* Tr. 1745-46, 1797, 1838.

[9] *See, e.g.*, 44 Fed. Reg. 28474, 28479 (May 15, 1979) (designation of USDA's approval of 1979-80 marketing policy as significant rulemaking action, but comments never solicited thereon); 45 Fed. Reg. 75454, 75455, 75457 (Nov. 14, 1980) (1980-81 quota program; same); 46 Fed. Reg. 23872, 23873 (Apr. 28, 1981) (weekly quota regulation noting completion of approval process); 45 Fed. Reg. 31953 (May 15, 1980) (noting designation of 1979-80 marketing policy approval as "significant" under provisions of E.O. 12044); USDA annual position papers approving annual quota program (Trial Exs. 694-701; Ninth Circuit Ex. Rec. at Tab 4) (approving annual quota programs without public participation).

[10] 49 Fed. Reg. 29071, 29076 (July 18, 1984) ("[T]he purpose of publishing a summary of the marketing policy is to gather information from the public to aid the Department in evaluating the marketing policy. Public comment on the published marketing policy summary will be requested well in advance of the beginning of the shipping season. The Department intends to compete its analysis of the marketing policy, and any public comment thereon, prior to the beginning of the season.").

the 1990-91 season, he has ignored all such input as evidenced by not one mention of it in the Federal Register quota notices. USDA adopted Guidelines in January, 1982, and May, 1983, calling for a gradual reduction of season-long quotas, but all subsequent Federal Register quota notices were completely silent as to compliance with these Guidelines. The record is replete with examples (all ignored by the Ninth Circuit) of comments and data submitted by Petitioners to which USDA never responded.[11]

It would be hard to imagine a case less appropriate for the "prejudicial error" rule. Not only would the *procedures* used by USDA have been different had USDA not illegally invoked the "good cause" exception, but the *substance* of the quota decisions reached would assuredly

---

[11] *See, e.g.*, Trial Exs. 111-113, 118-121, 159-66, 187-90, 301-02, 304-05, 436-437, 438, 445-50 and 758 (noting unexplained change in definition of "normal marketing season" from seven to nine months); 758, attachment (quotas inconsistent with AMAA policy in that they have failed to achieve and maintain parity prices, reduced per capita consumption, increased diversion to unprofitable byproducts and increased inequity among growers). These were all letters and studies sent to USDA by Petitioner Sequoia, even though USDA had not published notice or asked for comments, seeking data on which the quota proposals were based, definiiton of key regulatory terms and decision criteria such as the level of price and supply fluctuations deemed "unreasonable," citing studies and data showing the harm caused by quotas, demanding public participation, and opposing specific aspects of the quota program. Perhaps one of the most revealing letters is Sequoia's 9/23/85 letter to the Fruit Branch Chief. It compared the production and marketing factors for the upcoming season with the season just ended. It cited the conclusion of a USDA study that the eliminatton of quotas during the second half of the 1984-85 season did not disrupt markets. The letter also sought the right to participate in USDA's approval of the 1985-86 marketing policy. USDA marked the letter (received during pretrial discovery) "no reply necessary," and provided absolutely no response to comments on 1985-86 quota plan. These unresponded to comments are discussed in more detail by the Chief ALJ in his decision granting relief, ALJ. Dec. (Ninth Circuit Ex. Rec., Tab 1) at 29-43, and in the Secretary's decision denying relief, J.O. Dec. (Ninth Circuit Ex. Rec., Tab 2) at 191-99. These comments were completely ignored by the Ninth Circuit in its haste to excuse the Secretary's noncompliance with the APA.

have been different. First, USDA would have had to consider and respond to the comments. Second, USDA would have had to analyze the studies and data in its own files. These show that quotas were not needed and had effects contrary to the interests of growers.

USDA began requesting comments on the annual marketing policies for the 1985-86 season, coincident with the October, 1985 trial in this case. The fact that quotas have been imposed during significantly fewer weeks [12] since that date demonstrates that real public participation prior to 1985 would have made a difference in USDA's "result, thus undermining any contention that the procedural error was "harmless." There has been both an increase in total domestic fresh sales [13] and industry revenue.[14] For the 1991-92 navel season, USDA requested comments on the need for quotas, the domestic fresh allocation, shipping schedule, and the formulae for allocating quota among districts. 56 Fed. Reg. 49432 (Sept. 30, 1991). In response to overwhelming criticism of quotas in the comments, including the Justice Department, the Small Business Administration, consumer groups, and nearly all independent shippers, USDA increased the weekly quota recommended by NOAC during four weeks, albeit without any explanation or analysis.[15]

---

[12] During the 1985-86 through 1991-92 seasons, excluding the 1990-91 freeze season, quotas were imposed on District 1 during an average of 18 weeks, six weeks less than the average during the 1979-80 through 1984-85 seasons, a reduction of 25%.

[13] During the 1985-86 through 1991-92 seasons, excluding the 1990-91 freeze season, domestic fresh sales averaged 47,917,000 cartons, 4,877,000 cartons greater than the average during the 1979-80 through 1984-85 seasons of 43,040,000 cartons, an increase of 11%.

[14] During the 1985-86 through 1991-92 seasons, excluding the 1990-91 freeze season, industry domestic fresh revenue averaged $350,903,000, $87,064,000 greater than the average during the 1979-80 through 1984-85 seasons of $263,839,000, an increase of 33%.

[15] The February 14, 1992 termination of quotas only one week after issuance of the final rule, 57 Fed. Reg. 4691 (Feb. 7, 1992), more than three months earlier than recommended by NOAC, is further evidence that comments are performing their intended func-

56 Fed. Reg. 61109 (Dec. 2, 1991), 64188 (Dec. 9, 1991), 66341 (Dec. 23, 1991), 57 Fed. Reg. 1215 (Jan. 13, 1992). No quotas have been imposed on Valencia oranges since the 1986 season. Following the first bona fide request for comments on the need for lemon quotas, quotas have not been imposed since January, 1991.

b. The Ninth Circuit's abrupt and unexplained departure from the "bright line" test in *Buschman v. Schweiker*, 676 F.2d 352 (9th Cir. 1982),[16] will embroil the courts on a case-by-case basis in a fact-specific party-dependent romp through complex records and increasingly disparate agency decisionmaking processes in order to determine if there was enough "prejudice" to invalidate the challenged rules. App. 9a. The erroneous decision in this case demonstrates the folly of dragging the courts into rebalancing this portion of the government-society relationship already decided upon by Congress when it conditioned agency rulemaking on observance of the procedural safeguards in § 553.

The Court first assumed that the shippers had actual notice of the proposed quotas and that they "knew the ground rules."[17] App. 13a. There is no evidence in the record that the shippers knew about USDA's pre-season approval process, and of course none that they were allowed to participate in that process, as the APA mandates.[18] At the 1985 trial, USDA introduced no evidence

---

tion of educating decisionmakers as to the harmful effects of quotas. 57 Fed. Reg. 5975 (Feb. 19, 1992) ("The Department has concluded that at this time, regulation is not necessary to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937.").

[16] The Court invalidated welfare calculation methodology because HHS improperly relied on "good cause" exception in § 553(b)(3)(B). "In light of the importance of the notice & comment procedure," failure to provide it can never be harmless error. 676 F.2d at 356-58.

[17] The Supreme Court rejected a similar contention in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 225 (1988) (Scalia, J., concurring).

[18] The Court correctly concludes that USDA approved each season's quota program prior to the beginning of the season. App. 3a,

whatsoever. Even if there had been adequate notice, such notice is just the beginning of the public participation process, which includes (*all* absent in the present case) the opportunity to influence the decisionmakers (i.e., USDA, not NOAC), and reasoned consideration of comments and alternatives by the decisionmakers, as demonstrated by the agency explanation and justification in the basis and purpose statement.[19] Just because there were NOAC meetings, it was not *de jure* a foregone conclusion that there would be quotas. There was no evidence that anything said at a NOAC meeting was "before" or considered by the actual decisionmakers. It would be even more damning for the quotas if such comments were actually "before" the decisionmakers becaus they were *never* responded to in the final rules, either by the Secretary or NOAC. But actual notice is no substitute for the public participation required by the APA.[20] Attendance at NOAC was irrelevant because NOAC was not the decisionmaker. The trial record showed that no comments by any party other than commenter NOAC were even responded to, considered by, or even presented to USDA's decisionmakers. Furthermore, no formal record was made of NOAC meetings or placed before USDA's decisonmakers. This case creates a split with the D.C. Circuit's decision in *Walter A. Holm & Co. v. Hardin*, 449 F.2d 1009

10a, n.5, 13a, 25a. However, the Court's harmless error analysis entirely overlooked the legal consequences of this fact, i.e. that shippers and the general public were entirely denied (until the 1990-91 season) their public participation rights with respect to these deductions. *See, e.g., Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013-14, 1016 (9th Cir. 1987); *McLouth Steel*, 838 F.2d at 1320, *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974).

[19] *See, e.g., Motor Vehicle Mfgrs. Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 46-57 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Independent US Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987), *cert. den.*, 108 S. Ct. 76 (1987).

[20] USDA can't subvert the APA by substituting NOAC meetings for the public participation required by the APA. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

(D.C. 1971), which required comments to and consideration and decision by the Secretary, not the industry's administrative committee.

Opposing and dissenting views were common at NOAC meetings, and many alternatives were frequently offered. Neither the Court nor USDA cited even a single Federal Register quota regulation in which these comments and alternatives were discussed by USDA. Indeed, there was never an instance where anything except the NOAC recommendation was even mentioned. Most importantly there was never any consideration in any of the quota regulations of the alternative "no quotas."

The second factor apparently relied upon by the Court is the longevity of USDA's illegal practices, i.e., "[t]his system of regulation existed for decades without challenge." App. 13a. The proposition that the legality of USDA's quota regulations can somehow be saved by the longevity of USDA's illegal actions is simply preposterous. If this were so, Rosa Parks would still be riding in the back of the bus. Oliver Brown's grandchildren would be attending segregated schools. Jeffrey Dalmer could expect a lighter sentence because he killed so frequently. The purpose of the APA's public participation requirement is to ensure that views at variance from the agency's proposal are placed before the agency, meaningfully considered by the agency, and available to reviewing courts as a measure by which they may test the correctness of the agency's decision. Absent compliance with procedural safeguards, it is no wonder that there have been few substantive challenges. USDA employed a scheme intended to frustrate participation and dissent by the 30 companies that were not NOAC members, and by the public at large, giving total deference to commenter NOAC.

Another purpose is to ensure that the agency discloses the data it relies upon, the assumption and expertise implicit in its regulatory choices, and the expected results of its regulations. Had USDA disclosed the economic impact of the quota regulations (e.g., reduced per capita

consumption, increased misallocation of resources, increased competition from unregulated oranges, increased diversion of fresh-quality oranges to unprofitable byproducts, and reduced grower revenue), the comment record would have contained opposition and dissent (as it does for the 1990-91 and 1991-92 seasons) that would now be available to this Court. It wasn't until the late 1970's when the quota program finally became so intolerable (e.g., phasing out shipment quotas on many of Petitioners' competitors) that Petitioners had to demand either its justification or termination. As a threshold matter, Petitioners had to first demand the Secretary's compliance with procedural safeguards so that he would have to consider the economic harm done by the quotas and respond to alternatives and criticism.

Finally, challenges to marketing order regulations must overcome an unusual roadblock. Challengers must exhaust administrative remedies through USDA's "kangaroo court." 7 U.S.C. § 608c(15)(A). USDA is the only agency where challenges to its legislative rulemaking decisions must be "laundered" by the agency itself. This process is almost endless (this case was filed on October 29, 1980).[21] This "laundering" procedure is a practical

---

[21] The Court's opinion is cloaked with a troubling inference that a generous harmless error standard to USDA was applied because alleged cheaters shouldn't be let off the hook on mere technicalities because they have clever counsel. "If we invalidate past volume restrictions, plaintiffs would obviously succeed in the pending forfeiture proceedings brought against them by the Secretary . . . [I]t was only after some handlers ran into trouble with the Department of Agriculture that, in looking for an escape, they came up with this challenge." App. 11a, 13a. The petition was filed on October 29, 1980. USDA sued Sequoia for allegedly violating the quotas in November, 1983. Belridge, Sunny Cove, and Riverbend have never been accused of violating quotas during the 1975-85 period. The lawfulness of USDA's actions is at issue, not whether handlers violated any regulations. The public participation and reasoned decisionmaking requirements are the core of the APA. USDA's flagrant non-compliance can hardly be characterized as "technical." Finally, injured parties may challenge rules either at

deterrent because highly perishable crops are at stake. It is so expensive, and results in nothing but a massive amount of USDA post hoc rationalization.[22]

The Court appeared to believe that attendance at NOAC meetings was an acceptable substitute for public participation under the APA.[23] NOAC's power is limited to making a recommendation, but APA comments must be received *and considered* by the decisionmaker. Even if

---

the post-promulgation pre-enforcement stage, or they may violtae the rule and raise the affirmative defense of its invalidity in an enforcement proceeding. 5 U.S.C. § 703 ("Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.") *See, e.g., U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251-52 (2d. Cir. 1977) (in enforcement action FDA rule prescribing time-temperature-salinity requirements for processing of smoked whitefish held procedurally invalid for failure to disclose scientific data that formed basis for rule and substantively invalid for "obscure[]" basis and purpose statement).

[22] The procedural and substantive validity of the quotas can only be upheld, if at all, on the basis of the record before USDA at the time of each quota decision; post hoc rationalizations must be disregarded. *See, e.g., Motor Vehicle Mfgrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *American Textile Mfgrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981).

[23] "Most significant is the fact that the Secretary gives interested parties an opportunity to appear and have their say at the weekly NOAC meetings, and that such input is received and considered by the NOAC in making its recommendation to the Secretary. . . . We have no difficulty with the Secretary's decision to rely on the NOAC to filter and digest public comments and to make a recommendation." App. 7a, 14a. Even though a handful of growers and handlers occasionally attended NOAC meetings, the "public" was not invited and obviously did not participate in USDA's decisionmaking process in any way. NOAC didn't "filter" comments for USDA's benefit. App. 14a. It excluded all views except its own recommendation as evidenced by the absence of any discussion of criticism or alternatives in USDA's final rules.

NOAC could be trusted [24] to faithfully forward dissenting and opposing views,[25] and alternatives to Washington,

---

[24] Commenting to NOAC is like the chickens asking the fox to dine elsewhere. NOAC is a government-sponsored cartel committed to a collectivist system of administered supplies and prices. Suppose Judge Kozinski appeared at NOAC with the following statement: "The problem lay not with the implementation of collectivism, but with its central premise. Quite simply, [NOAC] cannot take on the job of making all, or even a substantial number, of the important decisions [for the orange industry]. . . . People's talents, needs, aspirations, goals and limitations are too diverse and conflicting for any central authority to take account of. . . . Concentrating power in one central authority carries with it more palpable dangers as well. . . . [T]he state [or NOAC] cannot repeal the laws of economics; there is no fixed demand for [oranges], and no fixed supply of people willing and able to engage in particular occupations. The only satisfactory way of matching up supply and demand for [oranges] is through a pricing mechanism that allows individuals to take account of opportunity costs when making decisions. Finally, there is a greater danger in placing too much power in the hands of a few individuals [on NOAC]. Honesty and good will can only go so far in preventing abuses of power. The sad experience of the collectivist economies proves what should have been obvious all along; unless a society [or the orange industry] has competing sources of power, those in control will take advantage of their authority to promote themselves and their friends at the expense of everyone else." Kozinski, "The Dark Lessons of Utopia," 58 U. Chi. L. Rev. 575, 585 (1991). Such a comment, like those of Mr. Pescosolido and others who chose to disagree with NOAC's party line, surely would have fallen on NOAC's deaf ears. This is precisely why the legal obligation fell to (and was ignored by) USDA, the decisionmaker, to conduct and respond to the public participation, giving reasoned consideration to the recommendations of NOAC, the criticisms of Judge Kozinski, and the comments and alternatives of others.

[25] *See, e.g.*, NOAC 10/4/83 Minutes (Trial Ex. 776) (Mr. Pescosolido's questions regarding annual marketing policy forwarded to USDA for its consideration, but never answered; NOAC 10/27/83 Minutes (Trial Ex. 776 ("Mr. Pescosolido stated that he had spent a great deal of his own time and also had help from paid consultants in formulating the questions he had earlier presented. He then questioned as to whether his questions would be answered. Chairman Canham replied that the extent of the questions and the request that they be considered at this meeting appeared as though intended to prevent adoption of the Marketing Policy. Because of this, response to the questions would not be given at that time.").

there remains the fatal flaw that not a single quota regulation discusses the "comments" received at NOAC meetings, responds to comments, or considers alternatives to the NOAC recommendation.

3. The Ninth Circuit's construction of the "prejudicial error" rule requiring challengers to prove prejudice beyond the mere denial of procedural rights is contrary to Congressional intent. The House Judiciary Committee explained:

> The requirement that account shall be taken "of the rule of prejudicial error" means that a procedural omission which has been cured prior to finality of the action involved by affording the party the procedure to which he was originally entitled is not a reversible error.

H.R. Rep. No. 1080, 79th Cong., 2d Sess. 46 (1946) ("House Report"), *reprinted in, Administrative Law (Pike & Fisher) 3d*, Desk Book at 3-104 ("Desk Book"); S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945) ("Senate Report"), *reprinted in*, Desk Book at 3-36 (same). The focus is on agency action, i.e. whether it complied with procedural minima. There is absolutely no indication that challengers had to prove actual harm other than that a procedural right due them was ignored. The Ninth Circuit correctly found that the Secretary failed to follow a required procedure, and indeed, ordered such compliance in the future. App. 16a. It must follow, therefore, that the conceded "procedural omission" was not "cured prior to the finality" of the quotas. According to Congress, therefore, the Ninth Circuit should have held that the Secretary's "omission" was "reversible error." Regarding the judicial duty, Congress found:

> It will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any means or form of indirection, ...

House Report at 44, Desk Book at 3-102; Senate Report at 31, Desk Book at 3-39. The original construction of the APA by the Attorney General also demonstrates that denial of a guaranteed right is presumptively prejudicial:

> The last phrase in section 10(e) sums up in succinct fashion the "harmless error" rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded.

Attorney General's Manual on the Administrative Procedure Act 110 (1947), *reprinted in*, Administrative Conference of the United States, *Federal Administrative Procedure Sourcebook* 51, 159 (1985).[26] USDA's "error" was to improperly claim the "good cause" exception to public participation, a "right" provided by Congress to Petitioners. This Court should grant review to ensure that the Congressional admonition that courts "prevent avoidance of the requirements of the [APA] by any means or form of indirection" is faithfully followed.

4. Review should be granted to resolve the split in the Circuits created by this decision. Three other circuits that have specifically considered the applicability of the "prejudicial error" rule to instances such as the present case where the agency completely failed to engage in public participation have found the error presumptively prejudicial. *See, e.g., McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547-550 (excessive difference between proposed and final rules found presumptively harmful because there

[26] The exemplar case cited by the Attorney General helps illustrate the inapplicability to the "harmless error" rule to situations like the present case where there was no public participation. In *Market Street Ry. v. Cal. Railroad Commission*, 324 U.S. 548, 561-62 (1945), this Court upheld a rate order which was based in part on extra-record evidence, company reports submitted after the hearing. Since the decision was subject to "substantial evidence" review the Court correctly rejected the challenge because the hearing record, even without the new reports, would have independently supported the rate order. The exclusion from consideration of cumulative evidence could not have changed the result, but the Ninth Circuit could not possibly conclude that the Secretary's decision to impose quotas would have been the same had he engaged in the required public participation.

were no comments, no analysis of comments by EPA, and no reasoned decisionmaking with respect to the particular issue of past ownership restrictions); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215-16 (5th Cir. 1979) ("Were we to allow EPA to prevail on this point [that post-promulgation comments were an acceptable substitute for prior notice and comment opportunity] we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post promulgation comment, and republish the regulation before a reviewing court could act. . . . Nor can the Agency rest on the doctrine of harmless error. . . . *Here, the Agency's error plainly affected the procedure used, and we cannot assume that there was no prejudice to petitioners. Absence of such prejudice must be clear for harmless error to be applicable.*") (emphasis added), *rehearing and clarification denied*, 598 F.2d 915 (emphasizing that invalidated rules cannot be applied by EPA). Most courts facing the problem of agency noncompliance with one or more of APA's procedural safeguards have simply invalidated the rules without pause to even consider the possibility that such errors might not be prejudicial.[27]

---

[27] *See, e.g., San Diego Air Sports Center v. FAA*, 887 F.2d 966 (9th Cir. 1990); *Southern California Aerial Advertisers' Association v. FAA*, 881 F.2d 672 (9th Cir. 1989); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989); *State of Alaska v. U.S. Dept. of Transportation*, 868 F.2d 441 (D.C. Cir. 1989); *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987); *affirmed*, 488 U.S. 204, 109 S. Ct. 468 (1988); *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987), *rehearing denied and opinion amended*, 819 F.2d 237; *Lionz. v. Heckler*, 800 F.2d 871 (9th Cir. 1986); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *Chocolate Mfgrs. Assn. of US v. Block*, 755 F.2d 1098 (D.C. Cir. 1985); *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983); *Action on Smoking and Health v. CAB*, 713 F.2d 795 (D.C. Cir. 1983), *subsequent appeal*, 724 F.2d 211 (D.C. Cir. 1984); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *Weyerhauser v. Costle*, 590 F.2d 1011, 1028-29 (D.C. Cir. 1978); *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *Arlington Oil Mills v. Knebel*, 543 F.2d 1092 (5th Cir. 1976); *Rodway v. USDA*, 514 F.2d 809 (D.C. Cir. 1975); *Walter A. Holm*

In *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the Court invalidated broad definitions of hazardous waste that exceeded the scope of the notice. The Court rejected EPA's argument that comments provided sufficient actual notice:

> Even if the . . . rules had been widely anticipated, comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, "notice necessarily must come —if at all—from the Agency."

Id. at 751, *quoting*, *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549. The Court flatly rejected EPA's argument that there was no prejudice because it had considered and repected all arguments raised by challengers:

> While petitioners must show that they would have submitted new arguments to invalidate rules in the case of certain procedural defects, such as an agency's failure to provide access to supplemental studies, *petitioners have no such duty when an agency has entirely failed to comply with notice-and-comment requirements.*

Id. at 752 (citations omitted; emphasis added). EPA also failed to give adequate notice of a groundwater monitoring requirement. Regarding prejudicial error, EPA argued that it nevertheless carefully evaluated each impediment to the leachate monitoring requirement, that none presented were insurmountable, and that post-promulgation comments did not identify any technical problems manifestly different from those already considered and rejected by EPA. Again, the Court rejected any suggestion that prejudice be shown:

> As we noted in our discussion of the mixture and derived from rules, however, *the Agency has completely*

---

v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); *P.A.M. News Corps v. Hardin*, 440 F.2d 255 (D.C. Cir. 1971); *Texaco v. FPC*, 412 F.2d 740 (3d Cir. 1969); *State of South Carolina ex rel. Patrick v. Block*, 558 F. Supp. 1004 (D.S.C. 1983), *rev'd on other grounds*, 717 F.2d 874 (4th Cir. 1983), *cert. den.*, 465 U.S. 1080 (1984); *Rivera v. Patino*, 524 F. Supp. 136 (N.D. Cal. 1981).

> *failed to comply with the APA's notice-and-comment requirements and thus cannot demand that [potential commenter] show prejudice.* Furthermore, the [commenter] has already submitted numerous comments, including comments that relate specifically to leachate monitoring at land treatment facilities, to which it has received no response. Because the EPA has failed to demonstrate that it received any relevant pre-promulgation comments, its claim that it can learn nothing new on remand is unacceptable.

Id. at 761 (emphasis added).

5. Although not as dangerous as the Ninth Circuit's expansion of the "prejudicial error" rule into an escape clause for agency noncompliance with APA procedures, there is one other important issue that justifies consideration by this Court. Both the Ninth Circuit and the District Court completely failed to perform the substantive component of judicial review, 5 U.S.C. § 706(2)(A), to determine whether the Secretary's decisions to impose quotas were the product of "reasoned decisionmaking." App. 2a, 16a, 33a (challenge to procedure, not substance). *See, e.g., Motor Vehicle Mfgrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency changing course has obligation to provide reasoned analysis beyond that required for original action; agency must examine relevant data and factors and articulate a sufficient basis for its action; agency must cogently explain why it has exercised its discretion in given manner); *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-16 (1974); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Both courts have so far departed from their judicial review responsibilities that this Court should exercise its supervisory power and summarily reverse this case and remand it for further proceedings.

Part II of the Court's opinion concludes thta the quotas were the product of "reasoned decisionmaking," but the Court examined only the *procedures* of decisionmaking

and not its *substance*. This conclusion is based on the reasonableness of relying on NOAC to collect data and make recommendations and on the *de jure* independence of the Secretary's decision from NOAC. App. 13a-14a. While *de facto* independence of the decisionmaker is a factor in substantive review of regulations, it is only one of many factors, the rest of which were all overlooked by the Court. The record doesn't even support the *de facto* independence of USDA from NOAC,[28] because of USDA's refusal to "receive" comments from any other source besides NOAC. There is no evidence to show that a single quota regulation recommended by NOAC was not approved by USDA.[29] This may mean nothing more than that NOAC recommendations were always reasonable. But, in consideration with all factors, this Court cannot find that USDA exercised the requisite independence. The most glaring failure of the quota decisions to substantively demonstrate reasoned decisionmaking was that quotas were phased out in all other regions of California and Arizona except the San Joaquin Valley, Petitioners' district. Yet there is not one word of explanation or justification in the regulations, a typical

---

[28] *See, e.g., City of Brookings Mut. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987); *American Horse Protection Assn. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), *review after remand*, 681 F. Supp. 949 (D.D.C. 1988); *Holm v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971); *National Farmers Org. v. Lyng*, 695 F. Supp. 1207 (D.D.C. 1988).

[29] Once USDA started soliciting comments, however, NOAC recommendations for quotas were turned down by USDA during the spring of 1985 and 1992. Tr. Ex. 775, 1985 NOAC minutes, 1/22, 1/29, 2/26, 3/5, and 3/12. NOAC recommendations were increased by USDA four weeks during the 1991-92 season. The Cost of Living Council ordered USDA to increase NOAC-recommended quotas for ten weeks during the spring of 1974. The first NOAC 1981-82 quota recommendation was not approved because USDA had not yet approved the annual marketing policy. Tr. Ex. 778, 1981 NOAC Minutes, 12/8/81 (reference to week ending 11/12/81). In one instance, NOAC wanted to continue quotas beyond the end of the quota period approved at the beginning of the season by USDA. Tr. 1817-18.

example of which can be found at App. 50a-52a, as to why quotas were imposed on District 1 only, and why these shippers were not afforded the same deregulatory relief granted their competitors in other districts, who were allowed "unlimited" shipments. This alternative ground for invalidation of the quotas (ALJ Dec. (Ninth Circuit Ex. Rec., Tab 1) at 74-77) was also not addressed by the District Court. App. 32a-33a.

Furthermore, there was never consideration or discussion of any alternatives, especially the option of not using quotas. There was never any response to Sequoia's letters criticizing the quotas. The trial record contains the unrebutted testimony that the many dissenting views expressed at NOAC meetings were never "upstreamed" (Tr. 1633) to decisionmakers. Both the Federal Register notices and testimony showed that there were no decisional criteria by which USDA could evaluate NOAC's recommendations. The senior USDA officials responsible for this program testified (Tr. 1818-19) that the NOAC recommendations were routinely "rubber stamped," that the quota decisions were not made (Tr. 1881-82, 1888) with sufficient "deliberate thought," that they did not have enough information (Tr. 1750-51, 1765, 1799, 1842, 1846, 1873-78) from which to conclude that the quotas effectuated the purposes of the AMAA, and that he transferred personnel (Tr. 1873, 1877-78) in an attempt to obtain required data and analysis.

Decisionmaker independence is but the beginning of the judicial inquiry into the substantive validity of the quotas. The regulations (typical examples appearing at 49 Fed. Reg. 48265 (Dec. 12, 1984) and 50 Fed. Reg. 5 (Jan. 2, 1985), App. 50a-52a) must also be examined against established judicial and statutory standards to determine whether they are otherwise arbitrary, capricious, or an abuse of discretion. Even a cursory examination of the quota regulations reveals almost every category of arbitrariness, caprice, and abused discretion. There was no discussion of alternatives, especially the most obvious alternative of not using quotas. There was

no explanation why some districts were given "unlimited" quotas while others were given quotas far below their actual requests. There was no nexus between the facts found and the decision to impose quotas, and no analysis of the factors set forth in 7 C.F.R. §§ 907.50(a), .51(a), especially the impact of competing unregulated citrus. Key regulatory terms were not defined, including "orderly marketing," and "reasonable" versus "unreasonable fluctuations in supplies and prices." Critical data was not disclosed, such as the economic model on which the quotas were allegedly based, the "market situation" currently confronting the industry, and "other available information." The quotas did not show compliance with the January, 1982 and May, 1983 Guidelines (Tr. Ex. 42, Tr. 1398-1401). The published decisions ignored key studies in USDA's own files [30] which contained adverse

---

[30] *See, e.g.*, Nelson & Robinson, "Retail and Wholesale Demand and Marketing Order Policy for Fresh Navel Oranges," 60 *American Journal of Agricultural Economics*, 502-09 (August, 1978) (study of increased quotas ordered during spring of 1974 showed that demand for naval organges was elastic, i.e. that industry revenue would increase as quotas were relaxed, contrary to claims of NOAC); Thor & Jesse [Tech. Bull. 1664, Tr. Exs. 39 & 40], *Economic Effects of Terminating Federal Marketing Orders for California-Arizona Oranges* (1981) (econometric model showed that long-term effects of terminating use of prorate are more fresh sales, reduced byproducts diversions, increased grower revenue, no incrased price or shipment variability, and reduced byproducts processing capacity); AMS (Study Team) [Agric. Econ. Rpt. No. 477], *A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops—Economic Efficiency and Welfare Implications* (1981) (excessively restrictive navel quotas has caused chronic overproduction and resource misallocation; efficiency losses from misallocation are likely to exceed any stabilization benefits); Jesse & Johnson [Agric. Econ. Rpt. No. 471, Tr. Ex. 41]; *Effectiveness of Federal Marketing Orders for Fruits and Vegetables* (1981) (no evidence that order commodity prices were higher, either in absolute terms or as a percent of partity, or more stable than comparable non-order commodities); Office of Management and Budget, *Agricultural Marketing Orders* (1982) (prices for unregulated citrus more stable than citrus subject to quotas); Office of Management and Budget, "Agricultural Marketing Orders" (2/18/82) (Tr. Ex. 738); U.S. Dept. of Justice (Tr. Ex. 737), Post-Hearing Brief and Exceptions

findings and ignored data in USDA's files that tended to show that the quotas had adverse economic impact or that quotas weren't needed in response to some perceived market disruption.

6. The Ninth Circuit's decision will cause significant short-run harm as well as its disastrous potential to inflict long-run damage to the decisionmaking process. Even through the Court granted prospective relief in the form of an injunction requiring the Secretary to comply with the public participation requirements of the APA with respect to any future quotas, the Court's decision leaves Petitioners without any remedy for the past violations of the APA. *Cf. McKesson v. Div. of Alcoholic Beverages & Tobacco, Dept. of Bus. Reg. of Florida*, 496 U.S. 18 (1990). One enforcement case is currently pending against Petitioners Sequoia and Exeter in which the United States is seeking approximately $3.2 million in forfeitures under 7 U.S.C. § 608a(5) for alleged quota overshipments during the 1978-82 seasons. As the Ninth Circuit correctly recognized, App. 11a, invalidation of the

---

to Recommended Decision (1984) (favoring elimination of quotas because resource misallocation, harm to growers, and lack of demonstrated need); General Accounting Office, *The Role of Federal Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions*. [RCED 85-57] (1985) (USDA lacked objective economic criteria by which to measure marketing order performance in light of Congressional objectives); Agribusiness Associates, *Economic Analysis of Volume Controls, California-Arizona Navel Orange Marketing Order* (1985) (navel quotas have reduced producer and handler revenue); Powers, "Prices and Shipments During Prorate and Prorate Suspension for the California-Arizona Navel Orange Federal Marketing Order," *Citrus Fruits: Situation and Outlook* (Feb. 1986) (following Feb. 1, 1985 navel prorate suspension, wholesale prices were more stable, domestic fresh shipments increased, shipments to byproducts decreased significantly, and shipment variability decreased); Shepard, "Cartelization of the California-Arizona Orange Industry: 1934-81" 29 *Journal of Law and Economics* 83-123 (1986) (navel quotas have reduced grower returns by one-half; "The market allocation cum price discrimination program enforced by the marketing orders thus begets long-run market responses that are hostile to the very objectives that underlie the marketing orders.").

quotas in this case would provide a successful affirmative defense in pending enforcement cases. In addition, USDA claims to have settled several cases, App. 53a (USDA August 25, 1989 press release), and is demanding payments in at least 39 other cases totalling in excess of $12 million. Finally, there are 31 cases pending against shippers under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, for violations of orange and lemon quotas totalling over $60 million in forfeitures and damages. The enforceability of past quotas notwithstanding USDA's APA violations will be an affirmative defense in all of these cases. This count does not include an unknown number of violation cases pending under USDA's other marketing orders. All of the controversial supply control programs are located within the Ninth Circuit, so this decision will undoubtedly impact these cases also.

CONCLUSION

The Ninth Circuit begins its opinion with the pious observation that:

> [p]rocedure, not substance, is what most distinguishes our government from others. In the not-so-distant past, a government agency in the Soviet Union could impose controls on the production of commodities without bothering to involve the public in the decisionmaking process. By contrast, a government agency in the United States must usually give notice to, and accept comment from, the public before undertaking to place manacles on the invisible hand.

App. 2a. The far more important difference is that we adhere to the Rule of Law, under which government action taken without required procedures must be voided by reviewing courts. Without diligent exercise of this obligation by the courts, our guarantees of substantive and procedural safeguards against government abuse would be no more useful than the former Soviet Union's guarantees of free speech, press, and ballot. The Ninth Circuit correctly found that the challenged quotas were

imposed without the procedural safeguards in § 553 of the APA. It must follow, therefore, that they do not have the "force of law." For the foregoing reasons, Petitioners ask that this Court grant certiorari to review the erroneous and dangerous decision of the Ninth Circuit.

Respectfully submitted,

JAMES A. MOODY
Suite 600
2300 N. Street, N.W.
Washington, D.C. 20037
(202) 663-9011

September 8, 1992

APPENDICES

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 90-15505, 90-15781

RIVERBEND FARMS, INC., a California Corporation; SUNNY COVE CITRUS ASSOCIATION, a California cooperative corporation; BELRIDGE PACKING CO., a California corporation; SEQUOIA ORANGE COMPANY, INC., a California corporation; and EXETER ORANGE COMPANY, INC., a California corporation,

Plaintiffs-Appellants,

v.

EDWARD R. MADIGAN, Secty Dept. of Agriculture,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California

Argued and Submitted Sept. 12, 1991

Decided March 17, 1992

James Moody, Washington, D.C., and Thomas E. Campagne, A Professional Corporation, Fresno, Cal., for plaintiffs-appellees-appellants.

Mark W. Pennack, U.S. Dept. of Justice, Washington, D.C., for defendant-appellant-appellee.

Before CANBY and KOZINSKI, Circuit Judges, and CARROLL,** District Judge.

KOZINSKI, Circuit Judge.

Procedure, not substance, is what most distinguishes our government from others. In the not-so-distant past, a government agency in the Soviet Union could impose controls on the production of commodities without bothering to involve the public in the decisionmaking process. By contrast, a government agency in the United States must usually give notice to, and accept comments from, the public before undertaking to place manacles on the invisible hand. 5 U.S.C. § 553. In this case, we address some of the details of this notice and comment requirement.

Background

Plaintiffs are domestic "handlers" of navel oranges: they buy, sell, consign, transport, ship, or by other means place oranges in the current of commerce. 7 C.F.R. § 907.10 (1991). They challenge the procedure used by the Secretary of Agriculture to regulate the navel orange market. Plaintiffs contend that the regulatory system: (1) neither complies with the Administrative Procedure Act's notice and comment requirements nor falls within the good cause exception to those requirements; (2) eviscerates the requirement that the Secretary engage in reasoned decisionmaking; and (3) denies plaintiffs equity in marketing opportunity.

The Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders limiting the quantity of commodities shipped into markets identified by the Secretary, thus protecting prices for producers and maintaining orderly marketing conditions. 7 U.S.C. § 602(1). Pur-

---

** The Honorable Earl H. Carroll, United States District Judge, District of Arizona, sitting by designation.

suant to the AMAA, the Secretary promulgated regulations in 1954 (Marketing Order 907, 7 C.F.R. Part 907) to govern the shipment of navel oranges from California and Arizona.[1] For the most part, the regulations promulgated in this marketing order still govern the navel orange market.

The regulations divide California and Arizona into four districts and authorize the Secretary to limit the quantity of navel oranges shipped from these districts to points in the continental United States or Canada during the navel orange marketing season, which generally runs from the middle of fall until the middle of spring.

Pursuant to the regulations, the Navel Orange Administrative Committee (NOAC), an eleven-member committee composed of ten representatives of growers, handlers or cooperative marketing organizations and one non-industry representative, develops its annual Marketing Policy before the start of each season. *See* 7 C.F.R. §§ 907.-20-.34; *id.* §§ 907.50-.51; Judicial Officer's Opinion, Finding of Fact No. 9(a), at 45-46. As part of this process, the NOAC notifies all handlers by letter and places advertisements in the newspaper before holding a public meeting concerning the proposed Policy. JO, Finding of Fact No. 14(d), at 70. The Policy estimates the weekly volume restrictions that will probably be needed during the upcoming navel orange season. JO, Finding of Fact No. 9(a), at 46. The Secretary then analyzes the NOAC recommendations in the Policy and issues a Position Paper indicating whether he intends to impose volume restrictions in the forthcoming year and what he intends those restrictions to be for each week during the season. JO, Finding of Fact No. 16, at 71-79.

Each Tuesday during the season, the NOAC holds a meeting to settle on a recommendation to give the Secretary for the following week's volume restrictions. Before

---

[1] Plaintiffs do not challenge the validity of the marketing order.

each meeting, NOAC members usually notify growers and handlers of navel oranges in order to obtain their general views on market conditions. JO at 190. At the meeting, growers, handlers and any other members of the public may participate. JO, Finding of Fact No. 17, at 79. After the meeting, the NOAC makes a recommendation to the Secretary as to the volume of oranges he should authorize for shipment into the domestic market for the week beginning that Friday. *Id.* After making its recommendation, the NOAC provisionally calculates the quantity of oranges that may be handled by each district, and by each handler within the district, during the coming week, 7 C.F.R. § 907.54(a), and informs the handlers of their scheduled allotment. The Secretary then issues the actual rule, which seldom varies from the NOAC's recommendation. JO, Finding of Fact No. 20, at 86. The rule is published in the *Federal Register* on Friday and sets the volume restrictions for the upcoming week. When the Secretary issues the rule, he includes a finding that states: "It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register." ALJ Decision, Finding of Fact No. 4(c), at 25.

Discussion

I

A. The Administrative Procedure Act ensures that the massive federal bureaucracy remains tethered to those it governs—or so the theory goes. When an agency decides to issue a rule, it must first publish a notice of proposed rulemaking in the *Federal Register*, which is the guide for those members of the public—usually special interest groups—who want to participate in the rulemaking process. The notice must contain "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under

which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is then allowed for interested parties to comment. *Petry v. Block*, 737 F.2d 1193, 1201 (D.C.Cir.1984). The public may comment "through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). After "consideration of the relevant matter presented," the agency publishes the final rule, accompanied by a "concise general statement of [its] basis and purpose," in the *Register*. *Id.*

The gestation period from initial notice to final rule can be a couple of months, and often much longer depending on the time the agency allows for comments and the time it takes to digest those comments. In addition to the time required for the notice and comment procedures to run their course, an additional thirty days ordinarily must pass between the time the final rule is published and the time it takes effect. 5 U.S.C. § 553(d).

B. The APA contains a few exceptions to the notice and comment requirements for informal rulemaking. One of these is the good cause exception, which applies when an agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The Secretary of Agriculture has relied on this exception for several decades and has never fully complied with the APA's notice and comment requirements before issuing weekly navel orange volume restrictions.

Plaintiffs, currently defendants in forfeiture proceedings for allegedly violating volume restrictions, argue that past volume restrictions are invalid because they were promulgated without observing the APA's notice and comment requirements. Plaintiffs argue that the good

cause exception cannot justify the wholesale abandonment of the APA's requirements week in and week out, year in and year out, for the entire life of a regulatory program. The Secretary counters that the regulatory process simply could not be carried out if he were required to follow APA procedures (which often take weeks or months) for rules that must be put into effect almost immediately and that have an effective life of exactly one week. We agree with both parties.

The Secretary certainly has the better of the argument when he points out that he has made a substantive regulatory decision that volume restrictions must be issued on a weekly basis, and that we and plaintiffs are bound by that decision. The APA was intended to impose procedural requirements on the adoption of rules; it is not a device by which an agency may be forced to adopt a less effective regulatory program in order to more effectively comply with notice and comment procedures. The existence of the good cause exception is proof that Congress intended to let agencies depart from normal APA procedures where compliance would jeopardize their assigned missions. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir.1983).[2]

---

[2] Under the good cause exception, notice and opportunity for comment is not required when doing so would be: (1) impracticable; (2) unnecessary; or (3) contrary to the public interest. Notice and comment is "impracticable" when the agency cannot "both follow section 553 and execute its statutory duties." *Levesque*, 723 F.2d at 184. Notice and comment is "unnecessary" when "the regulation is technical or minor." *Id.* Furthermore, "contrary to the public interest" supplements these terms and "requires that public rulemaking procedures shall not prevent an agency from operating." *Id.* (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945), *reprinted in* Senate Judiciary Committee, 79th Cong., 2d Sess., Administrative Procedure Act Legislative History 185, 200 (1946)). *See generally* Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Admin.L.Rev. 113, 120-52 (1984); Comment, *Agency Discretion to Accept Comment in Informal Rulemaking:*

At the same time, the good cause exception goes only as far as its name implies: It authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

The procedures the Secretary has adopted do not, in fact, depart radically from those contemplated by the APA. Most significant is the fact that the Secretary gives interested parties an opportunity to appear and have their say at the weekly NOAC meetings, and that such input is received and considered by the NOAC in making its recommendation to the Secretary. The procedure departs from normal APA practice in only three respects: First, the Secretary does not publish a *Federal Register* notice of the proposed weekly volume restriction, which would advise the public that it could comment at the NOAC meeting to be held the Tuesday before the week in question. Second, there appears to be no opportunity for written comments—or indeed any comments other than by persons attending the NOAC meetings. Finally, the volume restrictions go into effect immediately, bypassing the normal 30-day delay in the effective date of a final rule.

The last of these departures is the easiest to justify. To analyze it, we must first recognize that the APA contains two good cause exceptions: One, as we have noted, excuses failure to abide by the notice and comment requirements, and the other allows an agency to forego the 30-day waiting period between publication of the final

---

What Constitutes "Good Cause" Under the Administrative Procedure Act?, 1980 B.Y.U.L.Rev. 93, 100-01.

Emergencies, though not the only situations constituting good cause, are the most common. *See Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir.1987); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982).

rule and its effective date. *See* 5 U.S.C. § 553(b)(B) & (d)(3). Although some courts have failed to distinguish the two good cause exceptions, commentators and some courts have correctly recognized that different policies underlie the exceptions, and that they can be invoked for different reasons. *See U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir.1979) (good cause more easily found as to 30-day waiting period), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980); Comment, 1980 B.Y.U.L.Rev., at 97 (30-day waiting period "in no way relates to the notice and comment requirement, but the federal courts have not always been careful to maintain the distinction"); G. Edles & J. Nelson, *Federal Regulatory Process: Agency Practices and Procedures* § 4.2.III, at 68 (2d ed. 1991) (two good cause exceptions are "conceptually different").

Unlike the notice and comment requirements, which are designed to ensure public participation in rulemaking, the 30-day waiting period is intended to give affected parties time to adjust their behavior before the final rule takes effect. This is sensible; until the final rule is published, the public is not sure of what the rule will be or when the rule will actually be promulgated. In addition, a window of time usualy causes no harm.

Neither of these reasons for the waiting period is applicable to the navel orange regulatory system. The public knows the rule will take effect on Friday of the week in question and is given accurate, advance notice of what the rule is likely to be. *See* JO, Finding of Fact No. 18, at 83.[3] More importantly, requiring this 30-day waiting period would cause great harm: It would force the Secretary to predict weekly volume restrictions more than thirty days in advance. The record convincingly estab-

[3] The NOAC notifies handlers on Tuesday of its recommendation to the Secretary, and the Secretary has accepted this recommendation without change over 90% of the time. JO, Finding of Fact No. 18, at 83.

lishes the impossibility of accomplishing that feat with any degree of accuracy: The NOAC is constantly revising projections right up until, and occasionally even during, the week in question. *See* JO, Finding of Fact No. 12(a), at 60; *id.* No. 13(a), at 67; *id.* No. 18, at 83. We cannot impose a 30-day waiting period, in essence requiring the Secretary to predict market and weather conditions more than a month in advance, without throwing the entire regulatory program out of kilter. We therefore hold that the Secretary has shown good cause for making the weekly restriction effective upon publication in the *Federal Register.*

More problematic are the Secretary's other two deviations from normal APA procedures. While the Secretary argues persuasively that interested parties have actual notice of the weekly meetings, such notice is defective in two ways. First, the APA contemplates notice to all members of the public—regardless of whether individual members have a particularized interest in the regulatory program—by means of publication in the *Federal Register.* While *Federal Register* publication may be unnecessary or duplicative in some, if not many, cases, its prophylactic effect ensures that agencies and reviewing courts need not make the difficult and necessarily ad hoc determinations of who has a sufficient interest (i.e., would they comment if given notice?) in a proposed rule. Second, any notice given to interested parties does not contain anything akin to a proposed rule: The Secretary gives no indication of the proposed volume restriction for that week. It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon. 5 U.S.C. § 553(b)(3); K. Davis, 1 *Administrative Law Treatise* § 6.25, at 571 (2d ed. 1978).

The Secretary has not demonstrated that it would be impracticable to publish a notice in the *Federal Register* a few days before the NOAC meeting, advising the public

of the time and place of the meeting, the legal authority for the proposed volume restrictions[4] and the proposed volume restrictions.[5] The Secretary would not, of course, be bound by a proposed volume restriction—the purpose of notice and comment is to help the agency make an informed decision—but the agency would be required to give its best estimate based on the available information at the time the notice is published.[6]

The third deviation from the APA's normal practice is as troubling as the second: The Secretary allows only *oral* comments from those who attend the NOAC meetings. There may be persons interested in the naval orange market who are unable to attend, or have a representative attend, the weekly NOAC meeting, yet the Secretary has suggested no reason why he cannot accommodate the normal APA procedure of allowing the submission of written comments before promulgating weekly volume restrictions. It's clear that given even a few days notice, members of the public would have sufficient opportunity to submit written comments to the NOAC before the weekly meeting.

---

[4] This, of course, would simply require brief reference to the AMAA and Marketing Order 907.

[5] Given that the Secretary's annual position paper sets forth the planned weekly volume restrictions, the Secretary cannot seriously contend that it would be impracticable to include proposed figures in the notice. If, at the time the notice is published, it's too early to tell what the actual figures might be, the Secretary can say so in the notice and replicate the figures that were allotted for the week in question in the position paper.

[6] There is no requirement that the rule contained in the notice of proposed rulemaking be the same as the final rule: "Parties have no right to insist that a rule remain frozen in its vestigial form." *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir.1974); *see also AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir.1985) ("It is, of course, elementary that a final rule need not be identical to the original proposed rule.").

We thus conclude that the Secretary's rulemaking fails to satisfy the APA's requirements because he has not demonstrated good cause for failing to give sufficient notice in the *Federal Register* of the weekly NOAC meeting and failing to allow the public to comment by means other than personal participation at the NOAC meeting.

This conclusion, though important for how the Secretary must regulate the naval orange markets in the future, does not answer the question of most concern to the parties in this case: the remedy. We must decide what effect the Secretary's failure to comply with notice and comment requirements carries for past weekly volume restrictions. If we invalidate past volume restrictions, plaintiffs would obviously succeed in the pending forfeiture proceedings brought against them by the Secretary. It's to that question we now turn.

C. The APA requires that we take "due account" of the harmless error rule. *See* 5 U.S.C. § 706. It's true, as plaintiffs argue, that we must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA's procedural requirements, harmless error anaysis in administrative rulemaking must therefore focus on the process as well as the result. We have held that the failure to provide notice and comment is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached." *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir.1986) (quoting *Braniff Airways v. CAB*, 379 F.2d

453, 461 (D.C.Cir.1976)); *see also County of Del Norte v. United States*, 732 F.2d 1462, 1466-67 (9th Cir.1984) (applying harmless error rule in context of administrative rulemaking), *cert. denied*, 469 U.S. 1189, 105 S.Ct. 958, 83 L.Ed.2d 864 (1985); *cf. Buckley v. Valeo*, 424 U.S. 1, 142, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976) (upholding past administrative actions of Federal Election Commission though Commissioners were selected in violation of constitutional principle of separation of powers).[7]

Sagebrush exemplifies proper application of the harmless error rule. There, plaintiffs challenged the Secretary of the Interior's failure to give notice and hold hearings as required by the Federal Land Policy and Management Act (FLPMA). The Secretary had, however, held hearings pursuant to the National Environmental Policy Act. We agreed with the plaintiffs that "the notices did not comply in every respect with the terms of [the FLPMA]. However, we [found] the error harmless since the purposes of FLPMA's notice requirement were fully satisfied." 790 F.2d at 764. As to opportunity for comment, we similarly held that although the hearings were not in technical compliance with the statutory requirements the error was harmless because the hearings nevertheless "afforded the public a full and fair opportunity to be heard." *Id.* at 769.

Although *Sagebrush* dealt with the notice and comment requirements of the FLPMA, we find its reasoning

---

[7] Other circuits (including the D.C. Circuit, which handles administrative cases with numbing regularity) have also applied the harmless error rule to administrative rulemaking. For example, in *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C.Cir.1983), the court held that "even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless." *See also Shelton v. Marsh*, 902 F.2d 1201, 1206 (6th Cir.1990) ("cases specifically exploring the effect of failure to follow notice procedures have held that the doctrine applies where there is sufficient actual notice").

dispositive here. As we explained earlier, all parties before us knew the ground rules: that there would be an annual position paper setting proposed weekly volume restrictions; that the NOAC would meet every Tuesday during the season;[8] that the starting point for debate at those Tuesday meetings would be the figure listed for that week in the annual position paper (or in the NOAC's updated versions of it[9]); that there would be opportunity for public comment at the Tuesday meetings; and that the final volume restrictions would be issued by the Secretary soon afterwards. This system of regulation existed for decades without challenge; it was only after some handlers ran into trouble with the Department of Agriculture that, in looking for an escape, they came up with this challenge. While they are right that the Secretary must comply with some of the APA's technical requirements, ther belated challenge is evidence of the lack of prejudice resulting from the Secretary's failure to do so in the past thirty-five days.

If the procedural error here is not harmless, it's hard to imagine a case where it would be. While some may argue that would be all for the good, we cannot and will not presume that Congress intended the APA's harmless error rule to be a nullity. The Secretary's failure to comply with the specific dictates of the APA's notice and comment requirements is harmless, and we therefore will not invalidate the volume restrictions issued in the past by the Secretary.

II

Some courts have held that agency action is arbitrary and capricious if "the agency has not really taken a 'hard look' at the salient problems and has not genuinely en-

---

[8] Plaintiffs do not claim they were unaware of the Tuesday meetings.

[9] The NOAC has occasionally issued a revised schedule of estimated weekly restrictions to supplement or replace the original schedule. JO at 163.

gaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir.1970) (footnote omitted), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971). Plaintiffs argue that all volume regulations for the years in question must be set aside because the Secretary did not engage in reasoned decision-making.

Plaintiffs base their argument on the fact that the Secretary regularly relied on the NOAC to collect data from the growers and make recommendations for the weekly volume restrictions. The parties agree that the Secretary normally adopts NOAC's recommendation, although he does not always do so. *See* JO, Finding of Fact No. 20, at 86-87.

We have no difficulty with the Secretary's decision to rely on the NOAC to filter and digest public comments and to make a recommendation. Subject to the requirements of the APA, the Federal Advisory Committee Act, 5 U.S.C.App. 2, and other procedural requirements, the Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399, 60 S.Ct. 907, 915, 84 L.Ed. 1263 (1940). Here, the record makes it clear that the Secretary does not rubber stamp the NOAC's recommendations. Although the Secretary normally follows the NOAC's suggestions, he retains the authority to depart from or ignore them altogether.

III

Plaintiffs argue that the Secretary's exemption of naval oranges shipped to markets outside the continental United States and Canada from the volume restrictions violates the statute's "uniform rule" requirement. 7 U.S.C. § 608c(6)(C). The easy answer to this contention is that the statute gives the Secretary discretion to do

precisely what he does: He may designate certain markets to which handlers may ship limited quantities of naval oranges (they're the continental United States and Canada under the current regulations, *see* 7 C.F.R. § 907.18; *id.* § 907.67) and exempt other markets, thereby leaving them open for handlers to ship unlimited quantities. *See* 7 U.S.C. § 608c(6)(C) (allowing Secretary to restrict shipments to "any or all markets"). Shipments to markets other than the designated ones are simply irrelevant in determining whether the rule is uniform.

Plaintiffs also argue that the fact that *weekly* volume restrictions, calculated as percentages of each district's total crop, occasionally vary among districts is a violation of the uniform rule requirement. But the statute does not require that the Secretary limit every district every week to the same percentage of its crop as other districts. Rather, the Secretary has discretion to adjust allocations among districts during the course of the season; for purposes of the statute, the relevant time period is the season as a whole, not the weeks within it. *See id.*

It's true that during some weeks, and indeed some seasons, certain districts have been completely unrestricted. But those districts were obviously not going to, and did not, meet their full seasonal allotment to the continental United States and Canada. As the Judicial Officer concluded, "volume regulation may not be imposed in a district if it is obvious that the handlers in the district will not be able to use all of the allotments that otherwise would have been given to them." JO Finding of Fact No. 22, at 90. With a couple of de minimis exceptions, during no *season* has the Secretary allocated to any district a percentage of its total available crop greater than to any other district.

Conclusion

As governments elsewhere loosen their grip over commercial markets, the Secretary of Agriculture forges ahead with a government-mandated system of quantity

restrictions adopted nearly four decades ago. Whatever the merits of that policy, our concern is procedure, not substance. Though we disapprove of the Secretary's continued reliance on the good cause exception to abandon APA procedures altogether, his failure to do so in the past cannot serve to invalidate old volume restrictions.

On remand, the district court shall give the Secretary an appropriate period to comply with this opinion—at the latest by the time the Secretary begins imposing weekly volume restrictions for the 1992-93 navel orange season. To summarize, the Secretary must:

(1) publish an advance notice of the Tuesday NOAC meetings in the *Federal Register*, preferably at least a week ahead of time, which should include the time and place of the NOAC meeting, the legal authority for the proposed restriction and a tentative projection of the volume restriction for the week to follow the meeting; and

(2) allow parties to submit written comments to the NOAC and the Secretary in lieu of or in addition to permitting oral participation at the NOAC meeting.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15505

D.C. No. CV-88-0098-EDP

RIVERBEND FARMS, INC., a California Corporation; SEQUOIA ORANGE CO.; EXETER ORANGE CO., a California Corporation,

Plaintiffs-Appellees,

v.

EDWARD R. MADIGAN, Secretary
Department of Agriculture,
Defendant-Appellant.

No. 90-15781

D.C. No. CV-88-0098-EDP

RIVERBEND FARMS, INC., a California Corporation; SUNNY COVE CITRUS ASSOCIATION, a California cooperative corporation; BELRIDGE PACKING CO., a California corporation; SEQUOIA ORANGE COMPANY, INC., a California corporation; and EXETER ORANGE COMPANY, INC., a California corporation,

Plaintiffs-Appellants,

v.

EDWARD R. MADIGAN, Secty
Dept. of Agriculture,
Defendant-Appellee.

ORDER

[Filed Jun 9, 1992]

Before: CANBY and KOZINSKI, Circuit Judges, and CARROLL,* District Judge.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected.

---

* The Honorable Earl H. Carroll, United States District Judge, District of Arizona, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV F-88-98 EDP

RIVERBEND FARMS, INC., a California corporation, SUNNY COVE CITRUS ASSOCIATION, a California cooperative corp., BELRIDGE PACKING CO., a California corp.; SEQUOIA ORANGE COMPANY, INC., a California corp.; and EXETER ORANGE COMPANY INC., a California corp.;

Plaintiffs,

v.

CLAYTON K. YEUTTER,* Secretary of Agriculture of the United States,

Defendant.

MEMORANDUM DECISION RE: DEFENDANT'S MOTION FOR RECONSIDERATION

[Filed Mar. 22, 1990]

The Court entered its Memorandum Decision Re: Cross Motions for Summary Judgment. At the hearing on the defendant's motion for reconsideration, the Court requested the defendant to submit sworn statements explaining *when*, *how* and *by whom* the information upon which the weekly volume regulations under Marketing Order 907 is gathered, and when it becomes first available.

---

* Clayton K. Yeutter succeeded Richard Lyng as Secretary of Agriculture on February 16, 1989, and should be substituted as defendant in this suit. No further action is necessary to continue this suit, by reason of the last sentence of 42 U.S.C. § 405(g), and Fed.R.Civ.P. 25(d).

In reading the materials submitted by the government and reviewing the minutes of the respective Orange Committees on a random basis, the Court is not satisfied that the government has actually answered ~~the~~ Court's inquiry.

The government adequately explains the mechanics by which the Committee seeks to gather the information necessary to issue ther weekly volume regulations. For instance, in item five (5) of Mr. Peightel's declaration:

> *Item 5—Crop Condition Information.*
>
> HOW OBTAINED: Visual observations, report from packinghouses and reports from wholesale and retail trade.
>
> ORIGIN OF INFORMATION: Field staff, grower members of the committee, handlers, and sales personnel.
>
> WHO RECEIVES INFORMATION: Committee members, Secretary (USDA) and Committee management and staff.
>
> WHEN INFORMATION IS AVAILABLE: *Commitee members.* Handler members receive reports *daily* on fruit condition (holding quality, flavor and apearance) from their packers, and from their sources associated with the wholesale and retail trade. Grower members assess the condition of their crops continuously throughout the year.
>
> *Secretary (USDA).* On Tuesday morning of each week—(regularly scheduled meeting time).
>
> *Committee management & Staff.* On a daily basis from field staff, and from conversations with handlers.

Mr. Peightal's declaration is simply a recital of what the present system is. There is no explanation in either Mr. Peightal's declaration or in the presentation of the attorneys for the government as to why this information,

when received, could not be gathered or correlated on an earlier date.

Most fresh fruit is shipped and packed rather promptly without any appreciable holdover at the packing source. Oranges, on the other hand, are held for varying lengths of time until the color of the orange improves to the point that the produce can be entered into commerce.

The minutes of the Committee meeting merely reflect the procedure presently being used. They do not contain any information from which the Court can deduce that an emergency existed that justified the disregard of the law.

Accordingly, it is the order of the Court that the matter is remanded to the Secretary of Agriculture to enter an order requiring the Orange Administrative Committee to comply with the provisions of 5 U.S.C. § 553(b) or, alternately, when the Orange Committee determines that compliance with that section may be waived in accordance with law, to make findings of fact that justify a waiver of such requirement as provided in 5 U.S.C. § 553(B)(3)(b).

DATED: March 22, 1990

/s/ Edward Dean Price
EDWARD DEAN PRICE
United States District Judge

UNITED STATES DISTICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Cv F-88-98 EDP

RIVERBEND FARMS, INC., a California corporation, SUNNY COVE CITRUS ASSOCIATION, a California cooperative, corp., BELRIDGE PACKING CO., a California corp.; SEQUOIA ORANGE COMPANY, INC., a California corp.; and EXETER ORANGE COMPANY, INC., a California corp.,
Plaintiffs,

v.

CLAYTON K. YEUTTER,* Secretary of Agriculture of the United States,
Defendant.

MEMORANDUM DECISION RE:
CROSS MOTIONS FOR SUMMARY JUDGMENT

[Filed May 31, 1989]

Plaintiffs commenced this action by petitions filed pursuant to 7 U.S.C. § 608c(15)(A), relating to the Federal Marketing Order regulating the marketing of navel oranges grown in Arizona and designated parts of California. *See* 7 C.F.R. Part 907. It is conceded that plaintiffs are "handlers" of Navel oranges as that term is defined in the Code of Federal Regulations. Plaintiffs conduct their business within the State of California.

---

* Clayton K. Ceutter succeeded Richard Lyng as Secretary of Agriculture on February 16, 1989, and should be substituted as defendant in this suit. No further action is necessary to continue this suit, by reason of the last sentence of 42 U.S.C. § 405(g), and Fed.R.Civ.P. 25(d).

Plaintiffs enjoyed some success in the original administrative hearings. The Administrative Law Judge granted plaintiff's petition on the three (3) grounds asserted by plaintiffs in their appeal before this court.

The Secretary appealed the decision of the Administrative Law Judge. Judicial Officer Campbell reversed the Administrative Law Judge's decision and dismissed plaintiffs' petition. Plaintiffs now appeal the Secretary's final determination under 7 U.S.C. § 608c(15)(B) which provides in pertinent part as follows:

> The District Courts of the United States (including the Supreme Court of the District of Columbia [District Court of the United States for the District of Columbia]) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

The hearing officer, in rejecting plaintiffs' appeal, focused in part on the benefit that Sunkist Growers Inc., a cooperative marketing association of orange growers, obtained from the navel orange order. First of all, the hearing officer pointed out that the Senate report on the 1935 Act recognized that cooperative associations would be reinforced by these provisions.

Next the hearing officer pointed out that the Supreme Court itself had given its blessing to the provisions of the

code, namely that 7 U.S.C. § 608c(12) gave the cooperatives an acknowledged edge in being able to vote on behalf of all of its members.

Further, the hearing officer rejected some of the conclusions that plaintiffs drew from the evidence with reference to the relative strength of District 1 as opposed to District 2.

I. *Notice and Comment Requirements of 5 U.S.C. § 551.*

Plaintiffs' first argue that the Secretary failed to comply with the "notice and comment" requirements of 5 U.S.C. § 551-553.

Section 553 outlines the procedure to be followed in the agency's rule-making process. One court held that regulations issued pursuant to marketing orders promulgated under 7 U.S.C. § 608c are subject to the procedure proscribed by this section. *See Walter Holm & Company v. Hardin*, 449 F.2d 109 (D.C.Cir.1971). The Navel Orange Marketing Order, i.e., Marketing Order 907, was promulgated in 1953 after the Secretary had given notice and an opportunity for a hearing. The order was submitted to producers and handlers for their approval, and then went into effect. The marketing order only covers the domestic fresh orange market. Oranges that are subject to export are exempted.

The orange producing area is divided into prorate districts. This division occurred because the Secretary recognized that there are general differences in maturity dates and keeping quality of the oranges grown in the various geographical sections. *See* 7 C.F.R. § 907.66. The production area subject to the order is divided into four (4) districts. The Central Valley of California, and these plaintiffs, are included in District 1.

The marketing order authorizes the Secretary to impose weekly restrictions on the amount of oranges any dis-

trict may ship. This determination is to be governed by the Secretary's finding that such a quota will effectuate the purposes of the Act. The fact that oranges may exceed the parity price shall not impinge the Secretary's discretion. Finally, the Secretary may increase the quota anytime prior to or during the week. *See* 7 C.F.R. § 907.52. Regulation 907.110 provides for an equity factor to be used in determining the quota for each district. The equity factor for each district must be equal. The equity factor is a percentage of an orange tree crop that reflects the number of oranges in each district for which there will be equitable marketing opportunities under the volume regulations for the ensuing season. *See* 7 C.F.R. § 907.110.

A. *Secretary's Annual Position Paper*

Each year the Navel Orange Administrative Executive Committee drafts a marketing policy for the ensuing year. The completed draft is presented to the full Navel Orange Administrative Committee at a public hearing. Once the Navel Orange Administrative Committee approves the policy, public meetings are held. If adopted as a result of this public meeting (and it generally is), the policy statement is forwarded to the Secretary of Agriculture. The position of the United States Department of Agriculture is summarized in a position paper that makes broad projections of the volume of oranges that will be subject to volume restrictions, and discusses the information upon which the production projections are based.

In implementing the marketing policy, the Navel Orange Administrative Committee recommends any necessary volume restrictions the week before they are imposed. *See* 7 C.F.R. § 907.51. When the Secretary finds that limiting the quantity of oranges that may be handled in each prorate district during a specified week will tend to effectuate the purposes of the Act, the Secretary shall fix

such quantity as the quantity of oranges that may be marketed during that week's period. *See* 7 C.F.R. § 907.52.

It should be noted that the Secretary has imposed volume restrictions during each of the growing seasons from 1974-75 through 1984-85.

The scope of review in these cases was defined in *Prune Bargaining Association v. Butz*, 444 F.Supp. 785, 790 (N.D.Cal.1975), *affd.*, 571 F.2d 1132 (9th Cir. 1978).

> The jurisdiction granted the court is limited to an inquiry as to whether the Secretary's ruling is in accordance with law. The court is confined to reviewing the record of the Section 608c(15)(A) proceeding; the court can overturn the administrative determination only if it finds the Secretary's decision arbitrary, capricious or not supported by substantial evidence. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied sub nom., Lewes Dairy, Inc. v. Hardin*, 394 U.S. 929, 89 S.Ct. 1187, 22 L.Ed.2d 455 (1969); *Chiglades Farm, Ltd., v. Butz, supra.* This statutorily defined manner of challenging the Secretary's marketing orders and other regulations is expressly limited to handlers, however, . . .

Plaintiffs complain that the Secretary violated the requirements of the Administrative Procedure Act governing informal rule-making by promulgating the annual position paper.

Section 553 of Title 5 of the United States Code proscribes the notice and hearing procedures to be applied in rule-making, and exempts interpretative rules, general statements of policy, or rules of agency organization procedure or practice from its provisions. The Secretary contends that this exemption would serve to eliminate

the need for notice and hearing of the issuance of the position paper. A reading of the position paper reveals that the statements contained therein merely express the Secretary's expectations for the crop yield for the coming year. The position paper acts only to protect [sic] the upcoming crop and the factors which may influence the market. Announcements are based solely on estimates. They do not set the equity factor, the prorate basis, or the shipping schedules. The underlying marketing order, on the other hand, which was adopted after notice and hearing, provides that the volume restrictions may be implemented to effectuate the purposes of the Act.

The marketing regulations provide that the Secretary possesses total discretion to judge the annual shipments, as well as to choose each week whether to impose volume regulations. *See* 7 C.F.R. § 907.52. A reading of the position paper reveals that it simply announces the Agency's tentative plans for the future. Indeed, the judicial officer specifically found that the weekly shipping policy found in the Navel Orange Administrative Commitee's marketing policy is rarely identical to the volume regulation promulgated by the Secretary for any given week.

The mere fact that the Secretary used volume restrictions in almost every season since the order was promulgated, does not mean that he is mandated to do so. The recognition that volume restrictions might be implemented in a growing season does not in any way infringe the Secretary's discretion to use them or not to use them. The Secretary is free to impose them or not.

B. *Weekly volume and shipping regulations.*

Plaintiffs next argue that the weekly regulations, that control the volume of crop to be shipped into the open market, are subject to the notice and comment requirement of 5 U.S.C. § 553. They argue that the "good cause" exception to the notice and comment requirement is to be

used only when emergencies prevent the Agency from having time to conform to the notice and comment requirements.

In *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982), a panel of the Ninth Circuit observed:

> The notice and comment procedures in Section 553 should be waived only when "delay would do real harm." *U. S. Steel v. U. S. Environmental Protection, supra*, 595 F.2d at 214. The good cause exceptions is essentially an emergency procedure. This court would not permit the Environmental Protection Agency to rely solely on statutory deadlines to satisfy the good cause exception in enacting clean air standards. *Western Oil & Gas v. United States, E.P.A.*, 633 F.2d 803, 810-813 (9th Cir. 1980). *Accord: State of N.J. v. U. S. Environmental Protection*, 626 F.2d 1038 (D.C.Cir.1980); *U. S. Steel Corp. v. United States Environmental Protection, supra, Sharon Steel Corp. v. Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979).
>
> > "When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decision-maker should be vigorously enforced. This we believe is sound policy . . ." *Western Oil & Gas v. United States E.P.A.*, 633 F.2d at 813.

The judicial officer's answer to plaintiffs' argument that the weekly volume restrictions were improperly and routinely exempted from the provisions of 5 U.S.C. § 553 is answered beginning at page 79 of the Findings of Fact and page 190 of the General Discussion. The judicial officer demonstrated by chart that the practice engaged in by the Navel Orange Administrative Committee did not allow for the notice and comment provisions of 5 U.S.C. § 553 to be implemented. Starting at page 190, the judi-

cial officer discussed the activities of Mr. Pescosolido, a principal of one of the plainitffs in this case. Unfortunately, this discussion is wide of the mark. It does not come to grips with the provisions of the section and the purposes of the congressional mandate.

The Court is aware that from time to time, conditions will arise that make it important for the prorate quotas to be tested on short notice, i.e., weather conditions which limit the number of oranges that may be shipped; rain conditions which make harvest impossible or impractical. However, as pointed out by the judicial officer's decision in this case, the practice is constant, and no attempt has been made to limit the practice to those cases where intervening forces of nature make it imperative that the regulations be issued without the necessity or possibility of public comment.

In *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983), the Circuit Court had occasion to analyze substantively the basis for claims for good cause. In that case the Court stated:

> We also analyzed the three bases the statute provides for a claim of good cause; impracticability, lack of necessity, and the public interest, 4 [sic] U.S.C. § 553(b)(B) (1982). Impracticability was said to exist when the agency could not both follow section 553 and execute its statutory duties. *See* 619 F.2d at 145. Public procedures are "unnecessary," we concluded, when the regulation is technical or minor. *See id.* Finally, "'[p]ublic interest' supplements the terms 'impracticable' or 'unnecessary'; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest rule-making warrants an agency to dispense with public procedure."

It appears that the judicial officer's determination on this point is not in accordance with law.

II. *The Department's Unequal Application of Volume Restrictions, vis-a-vis, District 1 and District 2.*

Finding twenty-two (22) of the judicial officer's decision states that in the 1982-83, 1983-84, and 1984-85 seasons, District 1 was subject to volume restrictions while no comparable restrictions were placed on Districts 2, 3 and 4. During some of the other seasons under consideration, volume restrictions were started later in Districts 2, 3 and 4 and ended earlier in Districts 2, 3, and 4 than that of District 1.

Section 608c(6)(C) of Title 7 of the United States Code provides that the marketing order may limit amounts which each handler may market under a uniform rule based upon the amounts which each handler has available for current shipment. This section was interpreted in *American Fruit Growers v. United States*, 105 F.2d 722, 726 (9th Cir. 1939) as follows:

> By 7 U.S.C. § 608c(6)(C) the Secretary of Agriculture may, after hearing, either make an allotment, or provide a method for allotment. By Order No. 2, the Secretary provided only a method. The provision of the act merely requires the allotment be made "under a uniform rule". The rule adopted by the Secretary is uniform, in that all handlers are allotted a quality by the same method or rule. The "uniform rule" is required to be "based upon the amounts which each such handler has available for current shipment". It is apparent, we think, that the rule had such a basis, for it was based upon the amounts which each such handler had available for current "seasonal" shipment.

Clearly then, the section only provides that the rule used to determine the allotments be uniformly applied. The rule does not require that an alloment must be equal among several districts.

Section 907.110 of Title 7 of the United States Code proscribes the procedure whereby equity of marketing opportunity will be afforded each of the prorate districts. Section A requires the Committee to establish an equity factor which will be the same for all prorate districts. The equity factor shall be stated as a percentage of the tree crop in each district, and shall reflect a quantity of oranges grown in each district for which there will be equitable marketing opportunity. At marketing policy committee for each prorate district, the Committee shall formulate a weekly shipping schedule for the ensuing season, reflecting insofar as practicable the desire of growers and handlers of oranges within the district as to the quantity of oranges grown in that district to be shipped under volume regulations each week. Subparagraph C provides that following each meeting, the Committee may review and make equitable modifications in the equity favor in the weekly shipping schedule. Subparagarph D mandates the timing of the shipping schedule. Subparagraph E delineates the factors which the committee must take into account in making its weekly recommendations. Subparagraph F requires the Committee to make such adjustment as it deems necessary to reflect changing crop or marketing conditions. Subparagraph G requires the committee to make calculations as to the percentage of the total tree crop that will be handled under volume restrictions and to prepare an estimate of weekly shipments based thereon.

In his Findings, the judicial officer demonstrated that taking the figures available for the growing seasons 1974-75 to 1983-84, District 1 shipped 66.30% of its product in the fresh domestic market, whereas District 2 shipped only 33.30% of its product in the fresh domestic market.

During the same period, District 1 shipped 3.80% in the fresh export market, while District 2 shipped 37.30% in the fresh domestic market. It should be noted that export shipments are not included within the calculations

for shipment quoted. By a series of tables beginning at page ninety-two (92) covering the 1980-81, 1981-82, 1982-83, 1983-84 seasons, the evidence demonstrates that the seasons start earlier in District 1 and last substantially longer than in District 2. Further, the shipments from District 1 exceeded the shipments from District 2 in the fresh domestic market by amounts from 40 to 1 to 35 to 1. Indeed, the chart would indicate that there is a general decline of production in District 2 as opposed to District 1.

In viewing the foregoing evidence, the Court cannot say as a matter of law that the judicial officer's version of the evidence is incorrect.

III. *The Secretary Failed to Engage in Reason Decision Making in Approving the Recommendations of the Navel Orange Administrative Committee.*

In their attack on the weekly volume recommendations, plaintiffs rely on the testimony of John Ford, the Deputy Assistant Secretary for Marketing and Inspection Services. Ford testified that he did not have information from which he could determine whether the volume restrictions effectuated the purposes of the Act. However, the judicial officer pointed out that Assistant Secretary McMillan and Assistant Secretary Ford were not involved in promulgating the weekly restrictions. Therefore, the only relevant testimony in the record was the testimony of Mr. Chioffi, the Chief of the Marketing Agreements Section. Chioffi was the United States Department of Agriculture Marketing Specialist until 1977. As such, he was responsible for receiving the statistical wire from the Los Angeles representative of the Department, analyzing the information and comparing it to prior years, and receiving the information as to what had transpired at the weekly Navel Orange Administrative Committee meetings. This latter information was supplied to Chioffi by telephone call from the field representative. The telephone call would be followed up by a written report that

included the Navel Orange Administrative Committee's dissenting views. Chioffi would then obtain price-marketing data and prepare an impact statement summarizing and evaluating the data used. Chioffi was identified by the judicial officer as the only witness "knowledgeable concerning the promulgation of the weekly volume limitations by the United States Department of Agriculture."

The judicial officer noted that although it was a rarity, occasionally the recommendations of the Navel Orange Administrative Committee were not accepted by the Department. However, plaintiffs have failed in their attempt to show that the procedure was sômehow flawed in its operation on the orange production allotments.

CONCLUSION

All of the seasons which have been put in issue have since passed. Plaintiffs have presented no evidence that but for the violation of the notice and comment requirement, the marketing orders would have resulted in different shipping restrictions in the marketing orders. Consequently, plaintiffs have not proven any damage suffered by them.

Accordingly, the Court remands the matter to the Secretary to enter an order requiring the Orange Administrative Committee to comply with the provisions of 5 U.S.C. § 553(b) or, alternately, when the Orange Administrative Committee determines that compliance with that section may be waived, to make findings of fact that justifies a waiver of such requirement as provided in 5 U.S.C. § 553(b)(3)(B).

DATED: May 31, 1989

/s/ Edward Dean Price
EDWARD DEAN PRICE
United States District Judge

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interprettive rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data,

views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-544, Sept. 6, 1966, 80 Stat. 393.)

7 U.S.C. §601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

May 12, 1933, c. 25, Title I, § 1, 48 Stat. 31; June 3, 1937, c. 296, §§ 1, 2(a), 50 Stat. 246.

7 U.S.C. § 602. *Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation*

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, *to establish and maintain such orderly marketing conditions* for agricultural commodities in interstate commerce *as will establish*, as the prices to farmers, *parity prices* as defined by section 1301(a)(1) of this title.

(2) *To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets*, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

* * * *

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, *to establish and maintain such orderly marketing conditions* for any agricultural commodity enumerated in section 608c (2) of this title [which includes fruits] *as will provide*, in the interests of producers and consumers, *an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.*

7 U.S.C. § 608c. *Orders regulating handling of commodity*

* * * *

(6) *Other commodities; terms and conditions of orders*

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] *orders* issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), *no others*:

* * * *

(C) Allotting, or *providing methods for allotting, the amount of any such commodity or product*, or any grade, size, or quality thereof, *which each handler may market in* or transport to *any or all markets* in the current of interstates or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *under a uniform rule based upon the amounts which each such handler has available for current shipment*, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, *to the end that the total quantity of such commodity or product*, or any grade, size, or quality thereof, *to be marketed in* or transported to *any or all markets* in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *during any specified period or periods shall be equitably apportioned among all of the handlers thereof.*

* * * *

(7) *Terms common to all orders*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

. . . .

(C) *Providing for the selection by the Secretary of Agriculture*, or a method for the selection, *of an agency*

or agencies and defining their powers and duties, which shall include only the powers:

(i) *To administer such order in accordance with its terms and provisions;*

(ii) *To make rules and regulations to effectuate the terms and provisions of such order;*

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

. . . .

(D) *Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.*

. . . .

(11) *Regional application*

(A) *No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.*

(B) Except in the case of milk and its products, *orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistenly with carrying out such declared policy.*

(C) *All orders issued under this section which are applicable to the same commodity or product thereof shall,*

so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

* * * *

(16) *Termination of orders and marketing agreements*

(A) *The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.*

* * * *

7 C.F.R.: . . . .

§ 907.4 *Production area.*

"Production area" means the State of Arizona and that part of the State of California south of a line drawn due east and west through the present post office in Red Bluff, Calif.

§ 907.5 *Oranges.*

"Oranges" means those oranges . . . commonly known as navels, and which are grown in the production area.

. . . .

§ 907.7 *Committee.*

"Committee" means the Navel Orange Administrative

. . . .

Committee established pursuant to § 907.20.

§ 907.9 *Handler.*

"Handler" means any person who handles oranges.

§ 907.10 *Handle.*

"Handle" means to buy, sell, consign, transport, or ship oranges . . . or in any other way to place oranges

in the current of commerce, between the State of California and any point outside thereof in the continental United States, Alaska,[3] or Canada, or within the State of California, or between the State of Arizona and any point outside thereof in the continental United States, Alaska,[3] or Canada, or within the State of Arizona. . . .

§ 907.11 *Oranges available for current shipment.*

"Oranges available for current shipment" means all oranges as measured by the total tree crop.

§ 907.12 *Tree crop.*

"Tree crop" means the total quantity of oranges on the trees as determined by the committee.

. . . .

§ 907.18 *Export.*

"Export" means shipments of oranges to points outside the continental United States, Canada and Alaska.[3]

. . . .

Administrative Body

§ 907.20 *Establishment and membership.*

There is hereby established a Navel Orange Administrative Committee consisting of 11 members, for each of whom there shall be one alternate, and for each grower member an additional alternate. Six of the members and their respective alternates shall be growers. Four of the members and their respective alternates shall be handlers, or employees of handlers, or employees of central marketing organizations. One member of the committee and an alternate of such member shall be nominated as provided in § 907.22(f) . . . .

. . . .

---

[3] On January 11, 1985, "Alaska" was deleted through the amendment of this provision (50 Fed. Reg. 1429, 1430 (1985)). Many of the provisions that follow, which controlled the issuance of prorate and the weekly allocations of prorate, were also changed by the amendments of January 11, 1985.

§ 907.22 *Nominations.*

. . . .

(b) Any cooperative marketing organization, or the growers affiliated therewith, which handled more than 50 percent of the total volume of oranges during the fiscal year in which nominations for members and alternate members of the committee are submitted shall nominate three grower members, three alternate grower members, three additional alternate grower members, two handler members, and two alternate handler members of the committee.

(c) All cooperative marketing organizations which market oranges and which are not qualified under paragraph (b) of this section, or growers affiliated therewith, shall nominate one grower member, one alternate grower member, one additional alternate grower member, one handler member, and one alternate handler member.

(d) All growers who are not affiliated with a cooperating marketing organization which markets oranges shall nominate two grower members, two alternate grower members, two additional grower members, one handler member, and one alternate handler member.

. . . .

§ 907.28 *Powers.*

The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make and adopt rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part; and

(d) To recommend to the Secretary amendmens to this part.

§ 907.29 *Duties.*

The committee shall have the following duties:

(a) To select a chairman and such other officers as may be necessary, and to define the duties of such officers;

(b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and to define the duties of each;

(c) To submit to the Secretary at the beginning of each fiscal year a budget for such fiscal year, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such fiscal year;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare a monthly statement of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

((f) To cause its books to be audited by a certified public accountant at least once each fiscal year, and at such other times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To provide an adequate system for determining the total quantity of oranges available for current shipment, and to make such determinations, including determinations by grade, size, and maturity conditions, as it may deem necessary, or as may be prescribed by the Secretary, in connection with the administration of this part;

(i) To investigate the growing, handling, and marketing conditions with respect to oranges, and to assemble data in connection therewith;

(j) To submit to the Secretary such available information, including verified reports, as he may request;

(k) To notify producers and handlers of meetings of the committee to consider recommendations for regulation;

(*l*) To consult with such representatives of growers or groups of growers as may be deemed necessary and to pay the travel expenses incurred by such representatives in attending committee meetings at the request of the committee: *Provided*, That the committee shall not pay the travel expenses of more than three such representatives in connection with any one meeting of the committee;

(m) To investigate compliance with the provisions of this part; and

(n) With the approval of the Secretary, to reapportion the number of grower members or handler members on the Navel Orange Administrative Committee who are nominated pursuant to § 907.22(c) and (d). Any such reapportionment shall be based, insofar as practicable, upon the proportionate amount of navel oranges handled by the respective types of marketing organizations: *Provided*, That each of the grower groups described in § 907.22(c) and (d) shall be entitled to nominate at least one grower member and one handler member together with their respective alternates.

. . . .

Regulation

§ 907.50 *Marketing policy.*

(a) Prior to the recommendation for regulation for each prorate district, the committee *shall* submit to the Secretary its marketing policy for the ensuing season. Such marketing policy shall contain the following information: (1) the available crop of oranges in the prorate district, including estimated quality and composition of sizes; (2) the estimated utilization of the crop, showing the quan-

tity and percentages of the crop that will be marketed in domestic, export, and by-product channels, together with quantities otherwise to be disposed of; (3) a schedule of estimated weekly shipments to be recommended to the Secretary during the ensuing season; (4) available supplies of competitive oranges in all producing areas of the United States; (5) level and trend of consumer income; (6) estimated supplies of competitive citrus commodities; and (7) any other pertinent factors bearing on the marketing of oranges. In the event that it becomes advisable to substantially modify such marketing policy the committee shall submit to the Secretary a revised marketing policy setting forth the information as required in this paragraph.

b) All meetings of the committee held for the purpose of formulating such marketing policies shall be open to growers and handlers. The committee shall give notice to growers by publication of notice of such meetings in such newspapers as they deem appropriate and shall advise all handlers by mail of such meetings.

(c) The committee shall transmit a copy of such marketing policy report or revision thereof to the Secretary and to each grower and handler who files a request therefor. Copies of all such reports shall be maintained in the office of the committee where they shall be available for examination by growers and handlers.

§ 907.51 *Recommendation for volume regulation.*

(a) The committee *may* recommend to the Secretary the total quantity of oranges which it deems advisable to be handled during the next succeeding week in each prorate district. If, for any reason, the committee recommends the issuance of volume regulation but fails to recommend to the Secretary the total quantity of oranges which it deems advisable to be handled during the next succeeding week in each prorate district, reports representing the respective views of the committee members

with respect to its failure to act shall be submitted promptly to the Secretary.

(b) In making its recommendation, the committee shall provide equity of marketing opportunity to handlers in all districts and shall give due consideration to the following factors: (1) Market prices for oranges, including market prices by grades and sizes; (2) supply of oranges on track at, and enroute to, the principal markets; (3) supply, maturity, and condition of oranges in the area of production, including the grade and size composition thereof; (4) market prices and supplies of citrus fruits from California, Arizona, and competitive producing areas, and supplies of other competitive fruits; (5) trend and level in consumer income; and (6) other relevant factors.

(c) At any time during a week for which the Secretary, pursuant to § 907.52, has fixed the quantity of oranges which may be handled, the committee may, if such action is deemed advisable, recommend to the Secretary that such quantity be increased for such week. Any such recommendation, together with the committee's reasons for such recommendation, shall be submitted promptly to the Secretary.

(d) The committee shall, with the approval of the Secretary, adopt procedural rules and regulations to effectuate the provisions of this § 907.51.

§ 907.52 *Issuance of volume regulation.*

Whenever the Secretary shall find, from the recommendations and information submitted by the committee, or from other available information, that to limit the quantity of oranges which may be handled in each prorate district during a specified week will tend to effectuate the declared policy of the act, he shall fix such quantity. Such regulation may be made effective, as authorized by the act, irrespective of whether the season average price for navel oranges is in excess of the parity price specified

therefor in the act. The quantity so fixed may be increased by the Secretary at any time during such week.

§ 907.110 *Equity of marketing opportunity.*

Equity of marketing opportunity between prorate districts shall be afforded by the following procedure:

(a) The committee shall establish an equity factor which is the same for all prorate districts. The equity factor shall be stated as a percentage of the tree crop in each district and shall reflect a quantity of oranges (grown in each district) for which there will be equitable marketing opportunity under volume regulation during the ensuing season.

(b) At the marketing policy meeting for each prorate district the committee shall formulate a weekly shipping schedule for the ensuing season reflecting, insofar as practicable, the desire of growers and handlers of oranges within the district as to the quantity of oranges grown in that district to be shipped under volume regulation each week. The quantity of oranges on such schedules shall be computed by application of the equity factor to the tree crop of the district. The seasonal periods covered by such schedules shall be determined by the committee. Prior to any marketing policy meeting for a prorate district the committee may consult with such growers and handlers regarding formulation of such schedule.

(c) Following any or all marketing policy meetings for the districts, the committee may review and make equitable modifications, as it deems advisable in the equity factor and weekly shipping schedules.

(d) The committee shall develop a weekly shipment allocation schedule for each district commencing the week that regulation other than early maturity allotment is first recommended for the district and continuing through the remainder of the season. The quantities of oranges shown for each week shall be the cars appearing on the

then effective shipping schedule for that week for the district, plus a proportionate amount of the quantities appearing on such weekly shipping schedule during weeks when no regulation or early maturity allotment was in effect for such district. Whenever two or more districts are shown on such weekly shipment allocation schedule, the committee shall combine into a weekly total the quantity of oranges shown thereon for each week and the weekly quantity for a district shall be converted into a percentage of the said weekly total. The percentage shall be known as the percentage allocation to such district.

(e) Insofar as practicable, the committee shall, pursuant to § 907.51(a), base its weekly recommendations for the allocation of general maturity allotments and of freeze damage allotments among the prorate districts upon the percentage allocations for the districts provided for in § 907.110(d).

(f) The committee shall make such adjustments as it deems advisable in the equity factor, the weekly shipping schedules, and the percentage allocations to prorate districts, so as to reflect changing crop or market conditions. Any such adjustment in the weekly shipping schedule for a prorate district shall be based on the tree crop of handlers in the district who are on the prorate base at the time of adjustment and on the tree crop of all handlers in the district who received short-life allotment. Appropriate adjustments shall be made in the schedules and percentage allocations as soon as possible after a change in the estimated tree crop of any prorate district. Whenever a prorate district nears the end of the shipping schedule for that district and the committee ascertains that oranges (grown in that district) remain for handling under volume regulation, the committee may (1) adjust the equity factor upward with corresponding changes in the weekly shipping schedules for all districts or (2) adjust the weekly shipment allocation schedules for all districts by adding thereto the difference between the

aggregate quantity of oranges listed on the weekly shipment allocation schedule of each district during all of the preceding weeks and the sum of the aggregate quantity of oranges fixed by the Secretary for handling under general maturity and freeze damage allotment.

(g) The committee shall calculate each season, as soon as it is feasible, an estimated percentage of the total tree crop in the production area which, in the judgment of the committee, will be handled under volume regulation and prepare a schedule of estimated weekly shipments based thereof, taking into account the purposes of the act. Such percentage and schedule shall be used as the reference for determining adjustments in the prorate base of handlers, for granting short life allotment, and for matters wherein it is necessary to consider utilization of the crop within a district.

. . . .

7 CFR Part 907

(Navel Orange Reg. 610)

Navel Orange Grown in Arizona and Designated Part of California; Limitation of Handling

AGENCY: Agricultural Market Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of fresh California-Arizona navel oranges that may be shipped to market during the period January 4-10, 1985. Such action is needed to provide for the orderly marketing of fresh navel oranges during this period due to the marketing situation confronting the orange industry.

EFFECTIVE DATE: January 4, 1985.

FOR FURTHER INFORMATION CONTACT: William J. Doyle, 202-447-5975.

SUPPLEMENTARY INFORMATION:

Findings

This rule has been reviewed under USDA procedures and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley, Acting Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities.

This regulation is issued under the marketing agreement, as amended, and Order No. 907, as amended (7 CFR Part 907), regulating the handling of navel oranges grown in Arizona and designated part of California. The Agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation of and information submitted by the Navel Orange Ad-

ministrative Committee and upon other available information. It is hereby found that this action will tend to effectuate the declared policy of the act.

This action is consistent with the marketing policy for 1984-85. The marketing policy was recommended by the committee following discussion at a public meeting on September 25, 1984. The committte met again publicly on December 21, 1984, at Los Angeles, California to consider the current and prospective conditions of supply and demand and recommended a quantity of navel oranges deemed advisable to be handled during the specified week. The committee reports the demand for navel oranges is good.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared policy of the act. Interested persons were given an opportunity to submit information views on the regulation at an open meeting. It is necessary to effectuate the declared policy of the act to make this regulatory provision effective as specified, and handlers have been apprised of such provision and its effective date.

List of Subjects in 7 CFR Part 907

Marketing Agreements and Orders, California, Arizona, Oranges (Navel).

PART 907—[Amended]

1. § 907.910 is added as follows:

§ 907.910 Navel Regulation 610.

The quantities of oranges grown in California and Arizona which may be handled during the period January

4, 1985, through January 10, 1985, are established as follows:

(a) *District 1:* 800,000 cartons;

(b) *District 2:* Unlimited cartons;

(c) *District 3:* Unlimited cartons;

(d) *District 4:* Unlimited cartons.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Dated: December 27, 1984.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 84-35983 Filed 12-31-84; 8:45 am]

BILLING CODE 3410-00-00

REGIONAL
NEWS

United States Department of Agriculture

Agricultural Marketing Service

Information Staff
P.O. Box 96456
Washington, DC
20090-6456

Contact:

Becky Unkenholz
(202) 720-8998

ORANGE HANDLERS SETTLE ALLEGED MARKETING ORDER VIOLATIONS

WASHINGTON, Aug. 25—The U.S. Department of Agriculture announced that five handlers, who allegedly violated the California/Arizona Federal marketing order for navel oranges, have agreed to pay civil penalties. The penalties, totaling approximately $110,000, will be paid to the U.S. Treasury.

Daniel D. Haley, administrator of USDA's Agricultural Marketing Service, said Cal Citrus Packing Co., Inc., Lindsay, agreed to pay $36,000; Corona College Heights Orange and Lemon Association, Riverside, nearly $20,000; Gillette Citrus Company, Dinuba, nearly $6,000; Baker Brothers, Woodlake, more than $8,000; and Higham and Sons, Orange Cove, $40,000. The payments will be made to settle USDA allegations that the handlers violated the order's volume control regulations. USDA issued demand letters against the firms under regulations of the Agricultural Marketing Agreement Act of 1937.

The five cases were settled in light of the Riverbend Farms, Inc., et al. vs. Madigan case, in which a number of handlers challenged the validity of the marketing order's weekly volume regulations. In a March 17 decision, the U.S. Court of Appeals for the Ninth Circuit in San Fran-

cisco found that the regulations were valid and binding and supported USDA's authority to issue volume control regulations. Since that decision, orange handlers in violation of the order have come forward and have offered to settle their cases with USDA.

"The five firms' settlement of these overshipments bodes well for settlement of 39 similar cases," Haley said. "It also gives hope to those who have chosen to comply with the marketing order that the order will continue to function smoothly and fairly." The U.S. Attorney's office, USDA's Office of General Counsel and USDA's Agricultural Marketing Service are cooperating to insure prompt and timely enforcement of all marketing order regulations.

AMS-181-92

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 92-420

In the Supreme Court of the United States

OCTOBER TERM, 1992

RIVERBEND FARMS, INC., ET AL., PETITIONERS

v.

EDWARD R. MADIGAN,
SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the "harmless error" rule codified in the Administrative Procedure Act, 5 U.S.C. 706, in holding that the Secretary of Agriculture's failure to publish notice of weekly marketing order meetings in the *Federal Register* and to permit written comments at such meetings was harmless error where petitioners had actual prior notice of such meetings and the opportunity to comment.

2. Whether the court of appeals properly executed its responsibility to perform judicial review of agency action in holding that the Secretary's regulations were otherwise proper under the Administrative Procedure Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alcaraz v. *Block*, 746 F.2d 593 (9th Cir. 1984)	11
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	8
Chiglades Farm, Ltd. v. *Butz*, 485 F.2d 1125 (5th Cir. 1973), cert. denied, 417 U.S. 968 (1974)	14
McLouth Steel Prods. Corp. v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)	12-13
Pescosolido v. *Block*, 765 F.2d 827 (9th Cir. 1985)	10
Sagebrush Rebellion, Inc. v. *Hodel*, 790 F.2d 760 (9th Cir. 1986)	6, 9
Sharon Steel Corp. v. *EPA*, 597 F.2d 377 (3d Cir. 1979)	13
Shell Oil Co. v. *EPA*, 950 F.2d 741 (D.C. Cir. 1991)	12
Shelton v. *Marsh*, 902 F.2d 1201 (6th Cir. 1990)	9, 11
Sierra Club v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981)	9
Small Refiner Lead Phase-Down Task Force v. *EPA*, 705 F.2d 506 (D.C. Cir. 1983)	9, 13
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940)	7
United States Steel Corp. v. *EPA*, 595 F.2d 207 (5th Cir. 1979)	13
Walter Holm & Co. v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971)	11

Cases—Continued: Page

Washington State Farm Bureau v. *Marshall*, 625 F.2d 296 (9th Cir. 1980) 11

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
- 5 U.S.C. 553 ..... 2, 4, 5
- 5 U.S.C. 706 ..... 2, 4, 6, 7, 8
- 5 U.S.C. 706(2)(A) 13
- 5 U.S.C. 706(2)(D) 8

Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 2
- 7 U.S.C. 602(1) 2
- 7 U.S.C. 608c(6)(C) 2, 7
- 7 U.S.C. 608c(15)(A) 4
- 7 U.S.C. 608c(15)(B) 4

7 C.F.R.:
- Pt. 907 2
  - Section 907.20 3
  - Section 907.52 2
  - Section 907.66 2
  - Section 907.67 2

Miscellaneous:

18 Fed. Reg. (1953):
- pp. 4708-4720 2
- p. 4710 2
- p. 4715 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-420

RIVERBEND FARMS, INC., ET AL., PETITIONERS

v.

EDWARD R. MADIGAN,
SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 958 F.2d 1479. The initial opinion of the district court (Pet. App. 22a-33a) and the opinion on the government's motion for reconsideration (Pet. App. 19a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. A petition for rehearing and suggestion for rehearing en banc was denied on June 9, 1992. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on September 8, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of the Administrative Procedure Act, 5 U.S.C. 553, 706, are set forth at Pet. App. 34a-36a. Pertinent portions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth at Pet. App. 36a-40a. Marketing Order 907, 7 C.F.R. Pt. 907, regulating the marketing of navel oranges in Arizona and California, is set forth at Pet. App. 40a-49a.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, (the AMAA or the Act), authorizes the Secretary of Agriculture (the Secretary) to issue marketing orders regulating the quantities of agricultural commodities shipped into markets identified by the Secretary, in order to protect prices for the producers and to maintain orderly market conditions. 7 U.S.C. 602(1), 608c(6)(C). In 1954, the Secretary promulgated regulations governing the shipment of navel oranges from California and Arizona, Marketing Order 907, 7 C.F.R. Pt. 907; see 18 Fed. Reg. 4708-4720 (1953), which are still largely in effect. The Marketing Order divides California and Arizona into four districts, 7 C.F.R. 907.66, and authorizes the Secretary to limit the number of navel oranges shipped from these districts during the navel orange marketing season, 7 C.F.R. 907.67, which runs from mid-autumn through mid-spring. The Marketing Order provides for weekly volume limitations on shipments, 18 Fed. Reg. 4710, 4715 (1953), whenever the Secretary finds that this "will tend to effectuate the declared policy of the act." 7 C.F.R. 907.52.

The Navel Orange Administrative Committee (the NOAC), established by regulation, is composed of growers, handlers, and marketers of navel oranges. 7 C.F.R. 907.20. Before the start of each season, the NOAC notifies all handlers by letter, and places newspaper advertisements as well, before holding a public meeting concerning its proposed annual Marketing Policy, which estimates the weekly volume restrictions that will be necessary in the upcoming season. The final version of the Policy is sent to the Secretary, who analyzes those recommendations in creating his own Position Paper, indicating whether he intends to impose volume restrictions and, if imposed, what he anticipates they will be. Pet. App. 3a.

During the marketing season, the NOAC holds open meetings each Tuesday at which market conditions, growing conditions, and the appropriate volume regulations for the coming week are considered. The NOAC then sends the Secretary a recommendation on the volume of oranges that should be authorized for shipment during the following week. The NOAC's recommendation, along with information generated by United States Department of Agriculture (USDA) personnel in California and Washington, D.C., is analyzed by USDA and a decision is made whether and at what level to impose volume restrictions for the coming week. Pet. App. 3a-4a; Sec. Dec. at 73-76, 244-245.

If a decision is made to impose such restrictions, USDA publishes a regulation in the *Federal Register* on Friday, which includes a statement explaining that, because volume regulations are imposed weekly on the basis of current data, USDA did not engage in notice and comment rulemaking, because it would be impracticable to do so. See Sec. Dec. at 100, 182-183.

2. Petitioners are handlers of navel oranges. In 1980, they filed an administrative action under 7 U.S.C. 608c(15)(A), complaining, in part, that the Secretary failed to follow notice and comment rulemaking procedures under the Administrative Procedure Act (APA), 5 U.S.C. 553, in issuing the weekly volume restriction regulations and annual position paper. Petitioners also claimed that the Secretary failed to engage in reasoned decision-making, see 5 U.S.C. 706, because of the USDA's reliance on the recommendations of the NAOC in carrying out the agency's functions under the AMAA.[1] These claims were first considered by a USDA administrative law judge who ruled in petitioners' favor on two issues related to the matter of the legality of the weekly volume regulation procedure, and in the government's favor on all the remaining issues. Both sides appealed the ALJ's decision to the Judicial Officer, the Secretary's designee for deciding such matters, who reversed the ALJ's decision in favor of plaintiffs and ruled in the government's favor on all the issues before him. See R.E. Vol. 1.

3. Petitioners then brought suit in the United States District Court for the Eastern District of California on February 18, 1988, seeking judicial review of the Secretary's decision under 7 U.S.C. 608c(15)(B).[2] On cross-motions for summary judg-

---

[1] Petitioners also complained that they had been treated unfairly compared with handlers in another district, because they were subject to volume restrictions when such restrictions had been suspended for oranges grown in the other district.

[2] The AMAA, 7 U.S.C. 608c(15)(B), permits judicial review of any orders of the Secretary in administrative proceedings brought by the handler under 7 U.S.C. 608c(15)(A).

ment, the district court granted judgment in favor of the Secretary on every issue but one—the court agreed with petitioners that the promulgation of weekly volume regulations without engaging in notice and comment violates the informal rulemaking provisions of the APA. See 5 U.S.C. 553. The Secretary appealed and petitioners cross-appealed.

4. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The court first held that it and the petitioners were bound by the Secretary's decision, first made in 1954 with the promulgation of the Marketing Order, that "volume restrictions must be issued on a weekly basis," Pet. App. 6a, and also agreed that the need to have weekly regulations furnished the necessary "good cause for making the weekly restriction effective upon publication in the *Federal Register*." *Id.* at 9a.

However, while noting that the procedures under the Secretary's system—giving interested parties the opportunity to comment at the NOAC mettings, with their input considered by the NOAC in its weekly recommendations to the Secretary—"do not, in fact, depart radically from those contemplated by the APA," Pet. App. 7a, the court noted that the Secretary's procedures did not provide for public notice in the *Federal Register* and that the notice that was accorded did not provide a proposed rule. Pet. App. 9a. The court held that the Secretary should henceforth "publish a notice in the *Federal Register* a few days before the NOAC meeting, advising the public of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions," Pet. App. 9a-10a, and should permit the submission of written comments

before promulgating weekly volume restrictions, *id.* at 10a. The court remanded the case for the Secretary to comply.

Having found that the Secretary had not shown good cause for forgoing APA procedures for notice and comment, the court proceeded to take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Noting that this "harmless error rule" must be applied with "great caution," the court opined that "the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.' " Pet. App. 11a (quoting *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d 760, 764-765 (9th Cir. 1986)). Applying that test for harmless error, the court found that the Secretary's failure to employ APA notice and comment procedures was harmless error on the particular facts of this case. The court noted that all the parties knew the ground rules:

> that there would be an annual position paper setting proposed weekly volume restrictions; that the NOAC would meet every Tuesday during the season; that the starting point for debate at those Tuesday meetings would be the figure listed for that week in the annual position paper (or in the NOAC's updated versions of it); that there would be opportunity for public comment at the Tuesday meetings; and that the final volume restrictions would be issued by the Secretary soon afterwards.

Pet. App. 13a. The court concluded that, in these circumstances, "[i]f the procedural error here is not harmless, it's hard to imagine a case where it would be." *Ibid.*

The court of appeals went on to reject petitioners' contention that the Secretary's weekly rules lacked "reasoned decision-making" because of the Secretary's reliance on the recommendations of the NOAC in issuing each week's rule, stating that "the Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation." Pet. App. 14a (citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940)). Concluding that the record "makes it clear that the Secretary does not rubber stamp the NOAC's recommendations" and "retains the authority to depart from or ignore them altogether," Pet. App. 14a, the court found no difficulty with the Secretary's utilization of the NOAC's recommendations.[3]

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or with that of any other court of appeals. The issues raised by petitioners are fact-specific and were properly resolved by the court of appeals. Further review is thus unwarranted.

1. Petitioners' principal argument is that the court of appeals ered in applying the "harmless error" rule of the APA, under which a reviewing court must take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. This contention is baseless.

---

[3] The court also rejected petitioners' contention that the Secretary's method of allocating volume restrictions among districts subject to Marketing Order 907 violated the AMAA's "uniform rule" requirement imposed by 7 U.S.C. 608c(6)(C). Pet. App. 14a-15a. Petitioners do not challenge this ruling.

a. Petitioners first argue that the harmless error rule cannot be applied in this case because no rule can have the force of law unless it was promulgated in accordance with the procedures mandated by the APA. Pet. 6-9. This amounts to nothing less than asking this Court to read the harmless error rule out of the statute, a request for which petitioners cite no authority and for which we have found none.

The APA provides broadly that "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. The "foregoing determinations" include the power of a reviewing court to set aside agency action taken "without observance of procedure required by law." 5 U.S.C. 706(2)(D). Thus, a reviewing court must look to see if the agency complied with the procedural requirements of the APA; if it did not, the court must then determine whether its error produced prejudice.[4] If no prejudice resulted from the error, the rule is still valid under the APA. And this is precisely what occurred in this case: the court of appeals reviewed agency action,

---

[4] Petitioners incorrectly assert that this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), "implicitly rejected a 'no prejudicial error' defense." Pet. 8. *Bowen* did not address the defense for the simple reason that the agency in that case made no attempt to assert the defense. Rather, the sole issue there was whether the agency acted properly in applying retroactively a new rule that replaced an earlier rule that had been set aside for procedural failure. A holding that an agency may not make a new rule retroactive does not address, by implication or otherwise, whether the original rule could have been sustained because the procedural error was "harmless." Indeed, elsewhere in their petition, petitioners acknowledge that this Court has never addressed the issue. See Pet. 6.

which the court found had been taken "without observance of procedure" required by the APA and, applying "the rule of prejudicial error," found that the agency's failure to follow such procedure was not prejudicial.

Petitioners' argument is also contrary to numerous holdings of the courts of appeals which have routinely applied the harmless error rule to find that agency rulemaking produced no prejudice where the interested parties had actual notice, as they did here. See, *e.g.*, *Shelton* v. *Marsh*, 902 F.2d 1201, 1206 (6th Cir. 1990) ("cases specifically exploring the effect of failure to follow notice procedures have held that the [harmless error] doctrine applies where there is sufficient actual notice"); *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d at 764 (failure to adhere to notice and comment procedures required by statute was not prejudicial under Section 706 because actual notice had been afforded and "the purposes of [the statute's] notice requirement were fully satisfied"); *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless"); *Sierra Club* v. *Costle*, 657 F.2d 298, 355 (D.C. Cir. 1981) (same). Petitioners have cited no case [5] accepting their naked assertion that the harmless error rule does not apply to agency rulemaking.[6]

---

[5] Petitioners cite a number of cases that have invalidated administrative rules without undertaking a harmless error analysis. Pet. 22 n.27. But the fact that some courts may have seen fit to dispense with such an analysis—without comment—does not alter the statutory command that "due account shall be taken of the rule of prejudicial error."

[6] Petitioners claim that their interpretation does not read the harmless error rule out of the statute, Pet. 9 n.6, but in

b. Petitioners next contend that the court of appeals erred in applying the harmless error rule to the facts of this particular case. Pet. 12. But whether the acknowledged error by the Secretary in failing to follow the notice and comment requirements of the APA was, in fact, prejudicial to petitioners is necessarily a fact-bound and case-specific issue. There is nothing unique or significant about this case that would warrant plenary review of the court's application of the harmless error rule.

Petitioners first attack the wisdom of marketing orders in general and Marketing Order 907 in particular, Pet. 10-20, and assert that the system created by the AMAA and its use of committees such as the NOAC does not permit full participation by handlers, such as petitioners, who were opposed to volume restrictions. Pet. 18-19 & nn.23-25. True or not, the wisdom of the Marketing Order was not before the court of appeals and is not before this Court. See *Pescosolido* v. *Block*, 765 F.2d 827, 830 (9th Cir. 1985). The merit of marketing orders is irrelevant to the question of the proper application of the harmless error rule on the particular facts presented.

Also irrelevant is petitioners' assertion that the notice and opportunity for comment afforded by the NOAC meetings were inadequate substitutes for APA notice and comment. Pet. 14-15, 18-19. The question

---

that footnote they defeat their own argument, for they concede that the harmless error rule does apply where noncompliance was "mere[ly] technical" and the "purposes of § 553 were met through other means." That is precisely what the court of appeals found here: the petitioners had adequate notice and opportunity for comment, although the Secretary's rulemaking procedures were not in strict compliance with the APA.

is not whether the Secretary erred in failing to follow APA procedures—the court of appeals has already held that he did. Rather, the question is whether petitioners were *prejudiced* by this acknowledged failure to follow those procedures. And that question is necessarily fact-bound. Cf. *Alcaraz* v. *Block*, 746 F.2d 593, 612 (9th Cir. 1984) ("inquiry into whether the Secretary properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play").

In this respect, the record makes clear, and petitioners do not dispute, that petitioners had actual notice of the NOAC meetings and attended many of them. Pet. 15. Thus, contrary to petitioners' assertions, Pet. 21-24, the court of appeals did not hold that petitioners must show that they were prejudiced by the failure to follow APA procedures. Rather, the court merely held that the record in this case showed that these petitioners were, in fact, not prejudiced because they received actual notice and an opportunity for comment under the Secretary's procedures. As the court of appeals recognized, this actual notice makes the harmless error rule applicable. See, *e.g.*, *Shelton*, 902 F.2d at 1206 ("the [harmless error] doctrine applies where there is sufficient actual notice"); *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296, 306-307 (9th Cir. 1980) (noting that informal communications provided notice even in the absence of formal notice and comment procedures).[7]

---

[7] Petitioners claim that this decision "creates a split" with *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971), which required, according to petitioners, "comments to and consideration and decision by the Secretary, not the industry's administrative committee." Pet. 15-16. No such conflict exists. In *Holm*, a committee of tomato handlers, like the NOAC

Petitioners err in stating that "[t]here is no evidence in the record that the shippers knew about USDA's pre-season approval process, and of course none that they were allowed to participate in that process * * *." Pet. 14. In fact, the NOAC's annual marketing policy—upon which the Secretary relies heavily during the development of his annual position papers, A.R. Tab 149, at 1924, 1926-1928, 1942, Exhs. 694-701; Sec. Dec. at 73-76—is the product of public meetings for which each petitioner received actual and personal notification. A.R. Tab 149, at 1077-1080, 1961. Likewise, the weekly volume regulations result from recommendations made by the NOAC as a result of open meetings attended by growers, handlers and other interested parties, including the petitioners in this case. *Id.* at 1018-1019. Thus, "[e]ven if the Department were required first to publish a notice of proposed rulemaking, there would be no practical increase in the opportunity for public input since the Committee's meeting process already allows for unlimited public input." Cioffi Aff. at ¶ 4; Supp. R.E. at 37.

c. Petitioners suggest that the decision of the court of appeals in applying the harmless error rule conflicts with *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (D.C. Cir. 1991); *McLouth Steel Prods. Corp.* v.

---

in this case, made recommendations to the Secretary. The court simply required that the interested parties be able to make "oral presentation[s] to Department officials" before rulemaking; it did not require a hearing before the Secretary himself. 449 F.2d at 1016. In this case, the Secretary's representatives attended all the NOAC meetings, and comments made in the NOAC meetings were forwarded by those representatives to the agency decision-makers who made the final decision. See Sec. Dec. at 243-246.

Thomas, 838 F.2d 1317 (D.C. Cir. 1988); *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (3d Cir. 1979); and *United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir. 1979). Pet. 21-24. Petitioners claim that these courts have rejected the applicability of the harmless error rule in cases "such as the present case where the agency completely failed to engage in public participation." Pet. 21. But none of these cases purports to hold that the harmless error rule does not apply where the party had *actual* notice of the proposed rule, the situation presented here.

2. Petitioners' final contention is that the lower courts inadequately examined the claim that the Secretary failed to engage in "reasoned decision-making" under 5 U.S.C. 706(2)(A), because of the Secretary's reliance on the NOAC recommendations. Petitioners claim no inter-circuit conflict or conflict with any decision of this Court with respect to this issue. Rather, petitioners assert only that the district court and the court of appeals "have so far departed from their judicial review responsibilities that this Court should exercise its supervisory power and summarily reverse this case and remand it for further proceedings." Pet. 24. This argument is frivolous.

There is nothing remotely improper about the Secretary's generally following the recommendations of the NOAC, particularly with respect to the Secretary's non-binding estimation as to whether volume restrictions might be necessary in the upcoming season. As the Secretary noted in his decision, the whole structure of the Act evidences Congress's intention that the Secretary rely heavily on committees of producers and handlers. The theory is that such reliance

will result in "the most sound decisions" because the handlers and producers serving on such committees have the greatest knowledge of market conditions. *Chiglades Farm, Ltd.* v. *Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

Similarly fallacious is petitioners' reliance on the testimony of "senior USDA officials," Pet. 26, in support of their assertion that the NOAC recommendations were "rubber stamped" by the Secretary. As the Secretary noted, these individuals did not determine the content of the position papers. Indeed, the "only witness" in the USDA who was knowledgeable concerning these weekly regulations was Ronald L. Cioffi, then Chief of the Marketing Agreements Section, Fruit Branch, Fruit and Vegetable Division of the Agricultural Marketing Service. Sec. Dec. at 239. Mr. Cioffi testified at length concerning the in-depth review given the NOAC recommendations, explaining the process and making clear the independence exercised by the USDA in issuing the weekly rules. *Id.* at 240. The Secretary found that the record showed "at least seven examples over a period of 4 years * * * where the NOAC recommended volume limitations for a particular week, but the Division Director refused to promulgate volume limitations," finding that this evidence "demonstrates that the Department independently evaluated NOAC's recommendations, and exercised [its] authority, when it felt it necessary, to differ with NOAC's recommendations." *Id.* at 241. As both the district court and the court of appeals held, these findings are fully sufficient to sustain the weekly regulations against petitioners' attack. See Pet. App. 14a, 32a-33a.

Moreover, the record demonstrates that most of the decisions of the NOAC were unanimous or near-

unanimous. Sec. Dec. at 242. In cases where there were dissenting views, the Secretary found that such views were conveyed to the Secretary's representatives in a number of ways, such as inclusion in the weekly impact statement and in telecopier wires sent by the Secretary's marketing field office representative. *Id.* at 243-246. The Secretary thus found that petitioners had failed to carry their burden of proof that the Agency's Division Director did not have sufficient information before him to make the necessary decisions on an informed basis. *Id.* at 246. All of these findings are completely ignored by petitioners.

Petitioners make a final argument that the court of appeals' decision, although it corrects the Secretary's errors prospectively, leaves petitioners without any remedy for the harm they have suffered. Pet. 28-29. This is of course because—as the court found—they were not prejudiced by the Secretary's admittedly incorrect procedures. They suffered no harm; they need no remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
MARK W. PENNAK
Attorneys

NOVEMBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 60084